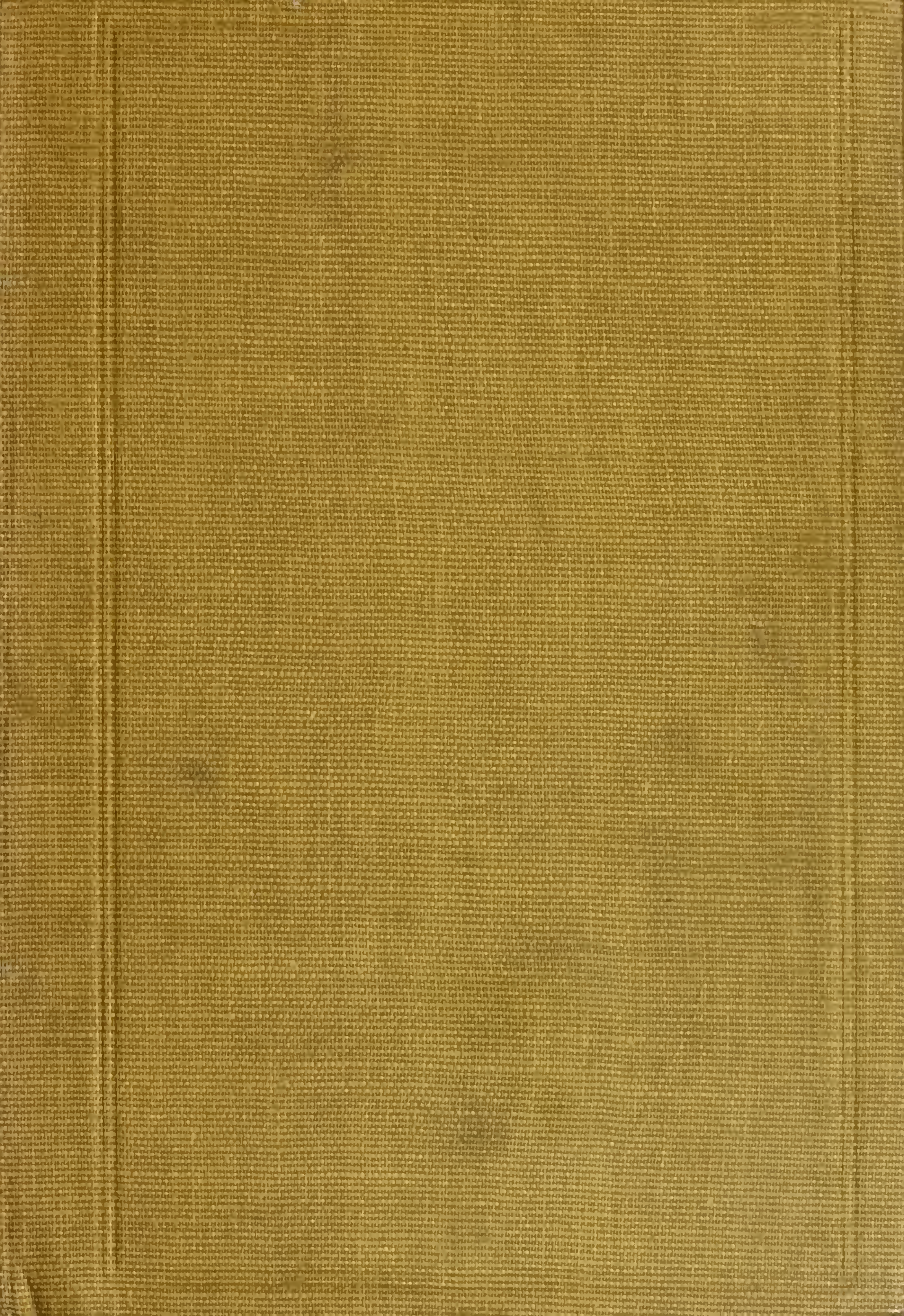


Form No. 7

San Francisco Law Library

No. 77560

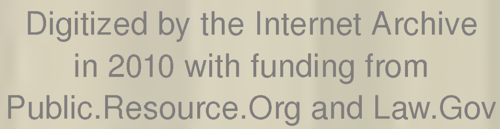
Presented by

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO.


Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

http://www.archive.org/details/govuscourtsca9briefs1434

No. 4496.

14470 IN THE 14734

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER B. STEWART, FRANK KUBOTA, JACK MILLER and OSCAR LUND,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR, JACK MILLER.

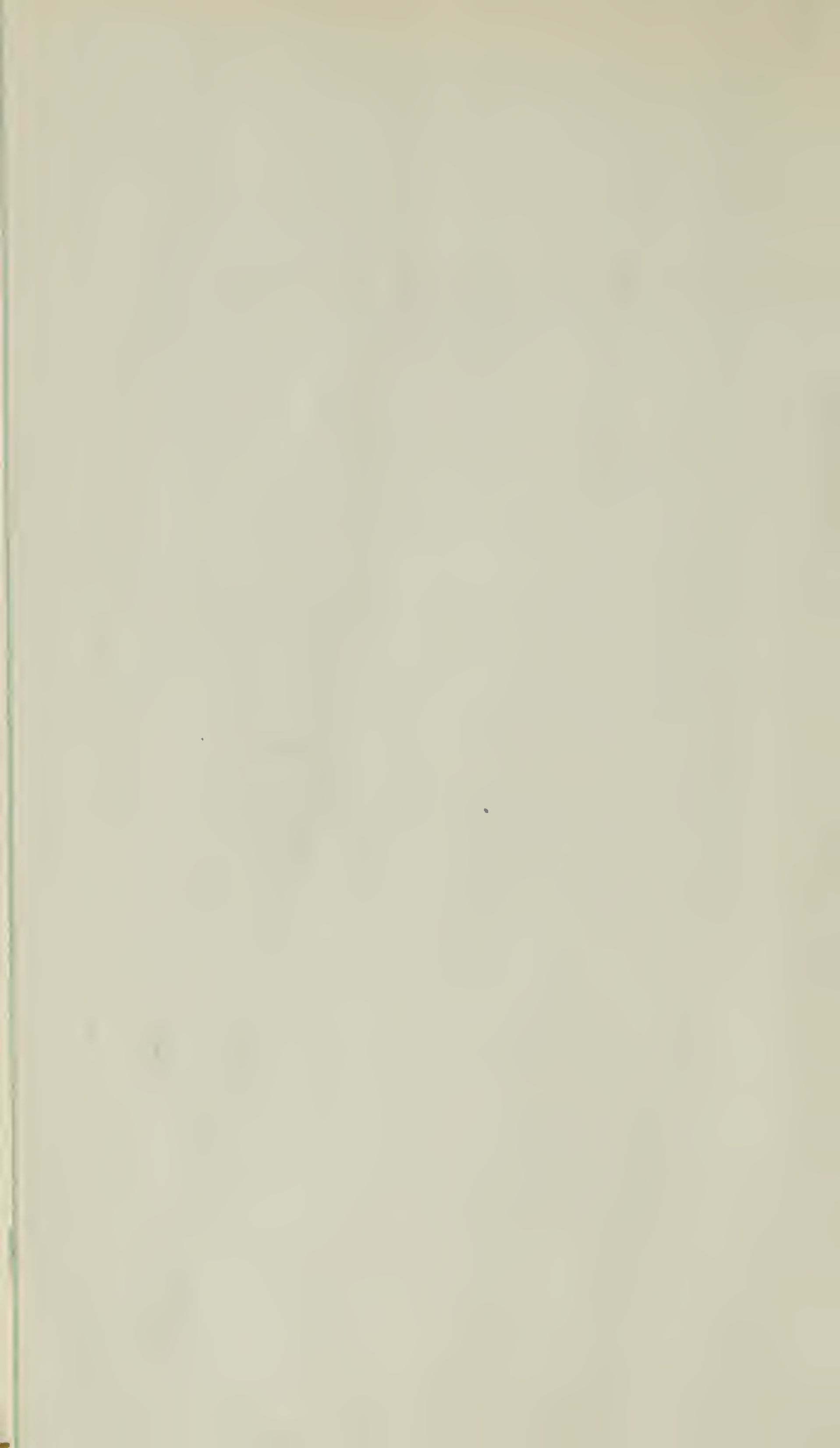
CHAS. J. WISEMAN,
HUGH L. SMITH,
JAMES M. HANLEY,
Attorneys for Plaintiff in Error Jack Miller.

FILED
FEB [illegible]
F. D. MONCKTON,
CLERK

THE RECORDER PTG. & PUB. CO., 693 STEVENSON ST., S. F.

TABLE OF CONTENTS.

	Page
Introduction	1
Statement of Facts	3
Specifications of Error	4
I. Testimony of a co-conspirator should be regarded with suspicion	4
II. Opinion evidence is inadmissible	6
III. A witness may refer to notes to refresh his memory, but he is not allowed to read them as his testimony	7
IV. Evidence of other crimes is not competent to prove the specific crime charged	8
V. Evidence of other crimes is unduly prejudicial to defendant	10
VI. An admission of guilt made by the defendant outside of court is inadmissible if it was made under circumstances involving such a hope of benefit as was likely to induce a false confession	11
VII. The court permitted improper redirect examination	13
VIII. The record of judicial proceedings is incompetent and inadmissible where such proceedings are irrelevant to the issue	13
IX. Alleged overt acts antedating the proof of the formation of the unlawful combination are inadmissible	14
X. Admission of testimony concerning contents of purported telegram violated the best evidence rule	15



No. 4496.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALEXANDER B. STEWART, FRANK KUBOTA, JACK MILLER and OSCAR LUND,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR, JACK MILLER.

INTRODUCTION.

The defendant and plaintiff in error, Jack Miller, was indicted on January 14, 1924, with some twelve other defendants, for a claimed violation of section 37 the Criminal Code of the United States, the indictment attempting to set forth a conspiracy to violate section 3 of title 2 of the Prohibition Act and section 593 of the Tariff Act of 1922. The conspiracy is alleged to have existed from January 1, 1923, down to the filing of the indictment.

The overt acts pleaded are substantially as follows: (1) That the defendant, Nagai, brought liquor from the steamer "Borealis" to the plant of the Curtis

Corporation, located at Long Beach, California. (2) That several of the defendants, including plaintiff in error Miller, met at this plant and assisted in unloading the boat used by Nagai in bringing in the liquor. (3) That at this plant the defendants Lewis, Dudrey and Knowlton loaded liquor on to automobile trucks, and the defendant Stewart drove away in an automobile containing liquor. (4) That the defendant Cheney rented some land in Topanga Canyon, California, to defendant Claude Dudrey, after which the defendants Claude Dudrey, Knowlton and Lund erected thereon a structure in which they caused liquor to be placed, which liquor was transported therefrom by the defendants Knowlton and Lund. The complete text of the indictment appears in the Transcript of Record (pp. 12-32).

The cause proceeded to trial on January 21, 1925. During the progress of the trial a motion was made on behalf of all the defendants to strike the word "feloniously" from the 2d and 3d counts of the indictment, and the words "section 813" from the 3d count. The Court ordered the word "feloniously" stricken from the indictment, but denied the motion as to the words "section 813." At the conclusion of the Government's case the defendants moved for a directed verdict, and to have the testimony given by the witness Dolly stricken from the record. On the 31st of January, 1925, the jury returned their verdict, and defendant and plaintiff in error Miller was found guilty on all four counts, being sentenced to two years' imprisonment and ordered to pay a fine of $15,000 (Trans. of Record, p. 121). A motion for a new

trial was made on behalf of defendant and plaintiff in error Miller, denied by the Court and an exception taken to the adverse ruling. On February 14, 1925, a petition for a writ of error was filed by the defendant and plaintiff in error Miller. The petition was allowed, a *supersedeas* bond being fixed in the amount of $50,000, which was subsequently reduced by the Court. (Trans. of Record, p. 267.)

STATEMENT OF FACTS.

Briefly, the transcript of record brings out the following facts: At 12:50 a. m. March 22, 1923, C. E. Clay, a watchman for the San Pedro Lumber Co., located at Long Beach, California, saw two trucks and a touring car driven by the defendant Lund, in front of the plant of the Curtis Corporation. He was suspicious and notified the police. The immediate result was the arrest of the defendants Dudrey, Lund and Knowlton by Officer Imbros, and the finding of some liquor in an automobile driven by the defendant Stewart.

Officer Murphy said he did not see the plaintiff in error Miller at the Curtis plant, and neither did newspaper reporter Arthur Pangburn, who was present when the arrests were made. The defendant Nagai was arrested on the same night, being the owner of a boat which was being used to land liquor.

The plaintiff in error Miller was arrested on the same night, *i. e.,* March 22, 1923, under circumstances explained by him in his testimony. (Trans. of Rec., pp. 195, 198.) He was not put in jail, but allowed to stay in a hotel.

The other defendants, with the exception of Talbot, were apprehended on the same night in the vicinity of the Curtis plant. Talbot was apprehended on April 16th in the automobile of one H. L. Brown, which was found to be transporting some liquor.

Around this statement of facts revolves the evidence on the basis of which plaintiff in error Miller was convicted on all four counts of the indictment. It is now purposed to consider somewhat in detail those phases of the testimony in the bill of exceptions affecting the plaintiff in error's case.

SPECIFICATIONS OF ERROR RELIED UPON.

1. Testimony of a co-conspirator should be regarded with suspicion.

Two of the alleged conspirators, Cheney and Nagai, testified for the government in this case. So far as the transcript shows, they furnished the only testimony concerning alleged operations at the Cheney ranch in Topanga Canyon. Cheney said he only *thought* the building alleged to have been erected by the conspirators contained liquor. (Trans. of Rec., p. 135.) Thus, he was only voicing an opinion, and admitting this testimony was a violation of the well-recognized opinion rule.

Furthermore, Cheney said he had seen Miller on his premises, but Miller denied this, and there was no corroboration by any Government witness. It is true that the jury were instructed that corroboration is necessary to the testimony of a co-conspirator. But it is submitted that the government did not comply with

this requirement of corroboration. In fact, it appears that none of the witness Cheney's statements were corroborated, and that therefore the government failed to establish its case with respect to operations of the alleged conspirators on the Cheney ranch. Both conspiracy counts of the indictment are concerned largely with these alleged operations, and the defendant and plaintiff in error Miller was prejudiced to the extent that Cheney's uncorroborated testimony was relied upon.

The same reasoning applies to the testimony of the defendant Nagai. In the first place, he only *thought* that the plaintiff in error Miller was on his boat. (Trans. of Rec., p. 137.) This fact was denied by Miller, and not corroborated by any other government witness. Such testimony is certainly not entitled to much weight, even if admissible, and as a matter of fact it appears inadmissible under the opinion rule. Here again, then, the plaintiff in error Miller is linked up with a phase of the conspiracy charged by the uncorroborated testimony of an accomplice. While the jury may convict on the uncorroborated testimony of an accomplice, it ought not do so. (16 Corpus Juris, par. 1424.) No man can receive a fair trial if he is forced to stand in a background of fraud and knavery created by the acts of others, but which necessarily throw their dubious gloom over his own conduct and impart a sinister significance to his own acts.

It should also be recalled that the credibility of the testimony of an accomplice is considerably affected where the accomplice testified with the hope of se-

curing immunity. (16 Corpus Juris, par. 1421.) It is clear that such a thought was in the mind of the witness Nagai, he having said:

> "I thought that if I confessed the punishment would be somewhat lighter. * * *" (Trans. of Rec., p. 139.)

II. Opinion evidence is inadmissible.

It is elementary that generally speaking a witness can only state facts within his personal knowledge, and is not entitled to voice his opinion. (22 Corpus Juris 485.) There are certain well-recognized exceptions to the rule prohibiting a witness to give his opinion, such as the admissibility of (1) so-called "mediate inferences" (*Holland* v. *Zollner,* 102 Cal. 633), (2) opinions on value, (3) opinions on the issue of sanity, and (4) opinions of experts. In the case at bar, an opinion of the witness Nagai was admitted, and it is submitted that such opinion was clearly inadmissible, not coming within any of the exceptions to the opinion rule. On page 137, Transcript of Record, the witness Nagai, in telling about the bringing in of liquor from a ship at sea, said:

> "We loaded, boxes, and I *presume* it was liquor."

Counsel for the defense objected to the admission of this testimony, and duly excepted when his objection was overruled. (Trans. of Rec., p. 138.) It should be recalled that Nagai was an accomplice, and was testifying against his alleged co-conspirators in the hope of escaping punishment. The court gave no reason for admitting this opinion testimony, and it was

clearly prejudicial to all the defendants, including the plaintiff in error Miller.

III. A witness may refer to notes to refresh his memory, *but he is not allowed to read them as his testimony.*

Police Officer Murphy, in testifying for the Government, used a typewritten copy of notes he had taken on the night liquor was found in defendant Stewart's automobile, and no objection was made to this. Officer Imbros then testified from a copy of the notes which Murphy had taken. Exceptions were duly taken to this testimony, on the ground that he was not using the notes to revive a present recollection, but was testifying from the notes themselves. On page 153, Transcript of Record, the Court asked:

> "I understand, Mr. Imbros, that you have no present independent memory of this conversation?"

Imbros replied:

> "Well, it has been so long since this happened, and I have had so many cases in the meantime, that I can't think of them all without having notations of them."

Thus it appears that Imbros did not have any definite recollection of what happened, and that the notes did not refresh his memory to the extent of enabling him to testify without reading therefrom. Therefore, the objection to Imbros' testimony should have been sustained.

Wigmore, learned author on the law of evidence, has said:

"Since the Narration or Communication should represent actual recollection * * *, it becomes necessary to forbid the use of various artificial written aids capable of misuse so as to put into the witness' mouth a story which is in effect fictitious and corresponds to no actual Recollection. Under pretext of stimulating the witnesses recollection, if an actual present recollection results, of the quality sufficient for testimony * * *, the process and the result are legitimate. But the expedients used for stimulating recollection may be so misused that the witness puts before the Court what purports to be but is not in fact his recollection and knowledge."

(Wigmore on Evidence, 2nd ed., Vol. II, Par. 758; see, also, Zoline's Fed. Cr. Law & Proc., vol. I, par. 380.)

It was undoubtedly prejudicial to plaintiff in error Miller for this testimony of Officer Imbros to get to the jury. Not only was there a violation of the rule against reading from a memorandum concerning the contents of which the witness has no present recollection, but it also appears that both Officer Murphy and the defendants testified against, said things not reported in the notes. It is not at all impossible that that which was not reported was more favorable to defendants than that which was written down.

IV. Evidence of other crimes is not competent to prove the specific crime charged.

While testifying concerning the plaintiff in error, Miller, Prohibition Agent Dolley was asked by the prosecution:

> "Well, now, he had never been in jail, had he, up to this time?"

Dolley answered:

> "I understand he served five years in Vancouver."

Counsel for Miller promptly asked that this testimony be stricken out. As a matter of fact, it would appear that upon proper objection, the Court should not have even allowed the question to be answered. In the first place, Dolley's answer was only his opinion, and thus inadmissible under the well-established opinion rule, considered elsewhere in this brief.

Secondly, the general rule is that on a prosecution for a particular crime, evidence which in any manner shows, or tends to show, that the accused has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible (16 Corpus Juris, 586. See, also, 22 Corpus Juris, par. 835). In the language of the Court in *Weil* v. *United States*, (1924) 2 Fed. (2d) 145, at p. 146:

> "An independent crime cannot usually be offered in evidence in order to prove the offense charged."

In *Guilbeau* v. *United States,* (1923) 288 Fed. 731, the defendant was charged with a violation of the Harrison Narcotic Law, the sale of morphine being charged. Evidence of other sales was admitted. With respect to this, the Court said:

> "In our opinion this evidence should not have

been admitted * * * The general rule is that evidence that accused has committed another crime wholly independent of that for which he is on trial is wholly irrelevant and not admissible." (288 Fed. 733.)

V. Evidence of other crimes is unduly prejudicial to defendant.

The rule which in general prohibits evidence of particular acts is based upon the principle that the admissibility of such acts would introduce collateral issues, confuse the jury, and lead to undue prejudice against the defendant.

The principle that the erroneous admission of evidence against an accused in a Federal Court will be presumed to have been prejudicial, unless it is made to appear beyond a doubt that it was harmless, is supported by the following cases:

> *Sprinkle* v. *U. S.,* 150 Fed. 56;
> *Angle* v. *U. S.,* 205 Fed. 542;
> *Miller* v. *Territory of Oklahoma,* 149 Fed. 330;
> *Williams* v. *U. S.,* 158 Fed. 30.

It has been said that:

> "Proof of them (other acts) only tend to prejudice the defendants with the jury, to draw their minds away from the real issue and to produce the impression that they (the defendants) were wretches whose lives were of no value to the community and who were not entitled to the benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death—— However depraved in character and however full of crime their past lives may have been, the defendants

were entitled to be tried upon competent evidence and only for the offense charged."

In *Hall* v. *U. S.,* 256 Fed. 748, the Court said:

"* * * any evidence tending to show that the defendant had made threats against the President, unconnected with the offenses of which he was convicted, became wholly immaterial to the issues then being tried, and could only create the impression that, in addition to the other offenses charged, defendant was disloyal to the Government and he had so far forgotten the rules of propriety as to attack the President. The introduction of this evidence would, of necessity, tend to create a false impression upon the minds of the jury, who would unconsciously reach the conclusion that one guilty of making such an unjustified attack upon the President must naturally be guilty of offenses wherein he was charged with being unmindful of the duty that he owed his country." (256 Fed. 749-50.)

VI. An admission of guilt made by the defendant outside of court is inadmissible, if it was made under circumstances involving such a hope of benefit as was likely to induce a false confession.

Of all the Government testimony reported in the Transcript of Record, that of Prohibition Agent Dolley was the most damaging to the plaintiff in error Miller, and the most likely to influence the jury. That the statements made by Miller to Dolley were in the nature of an involuntary (and thus inadmissible) confession is evident from Dolley's own statements. Among other things, he testified as follows:

"During the time we were in San Francisco, Mr. Miller was not on bail, but technically in custody. He was allowed more or less freedom

> while in San Francisco. It seems he did take trips around San Francisco by himself. *My reason for allowing this was he was furnishing information to me."* (Trans. of Rec., p. 169.)
>
> "The reason Mr. Miller was not put in jail the same as the other defendants was because he was talking about the events and furnishing me information." (Trans. of Rec., p. 171.)

Also, in answer to a direct question as to why Miller was allowed his freedom, Dolley replied that it was in exchange for his promise to furnish information. (Trans. of Rec., pp. 169-170.) It appears further that Miller offered to take Dolley to Vancouver and disclose the operations of the Independent Exporters, Ltd., a Canadian liquor concern. Steps were taken toward making this trip, the possibility of it being allowed was relied on by Miller, and he thus spoke more freely than he otherwise would have. Dolley did not tell Miller that anything he said would be used against him, and so admitted in his testimony. (Trans. of Rec., p. 168.)

It is elementary that to make a confession involuntary, and hence inadmissible, there must have been sufficient inducement by one in authority to elicit an untrue statement. It is submitted, however, that these tests are met by the case at bar, making Dolley's testimony inadmissible.

(1) Inducement. The plaintiff in error Miller had reason to hope for leniency, or perhaps freedom, when Dolley allowed him to remain unguarded in a hotel and took active steps to secure permission to make a trip to Vancouver for the purpose of producing the

records of a Canadian liquor-exporting firm. (2) Person in authority. A person in authority is one who has the right, owing to the relation which exists between him and the accused, to make assurances of favor to the person confessing. Any person officially connected with the prosecution is a person in authority. Furthermore, it is sufficient to render a confession involuntary if the inducement is reasonably presumed by the accused to have been made by one in authority. Thus, it is clear that plaintiff in error Miller's statements to Dolley were inadmissible under the confession rule.

VII. The court permitted improper re-direct examination.

On a re-direct examination, the examiner may seek by his questions to obtain such testimony as tends to deny, modify or explain the facts answered in the next preceding stage of examination, and no others. Thus, it would seem that it was improper re-direct examination of Government witness Nunn to ask him about a conversation with the defendant Knowlton, when it was admitted that the alleged conversation was not mentioned at any previous stage of the proceedings. (Trans. of Rec., p. 183.)

VIII. The record of judicial proceedings is incompetent and inadmissible, *where such proceedings are irrelevant to the issue.*

Counsel for the Government offered a certified transcript of the proceedings in a case brought by the State of California against one of the defendants,

Knowlton (alias King). This was immediately objected to by counsel for the defense, and an exception duly taken. It is submitted that the evidence objected to should not have been admitted, since it was wholly irrelevant, and undoubtedly a factor capable of influencing the jury against the defendants here, including plaintiff in error Miller. As was said in *Grantello* v. *United States,* 3 Fed. (2d) 117, to receive evidence of like offenses to those charged in the indictment under which the defendants are on trial is neither competent, fair nor just.

IX. Alleged overt acts antedating the proof of the formation of the unlawful combination are inadmissible.

Counsel for the Government asked the defendant Talbot the following question:

> "Did you December 26, *1922,* send a telegram headed 'Vancouver, B. C.,' addressed to Mrs. Hazel Talbot, 6576 Fountain Ave., Los Angeles, California?" (Trans. of Rec., p. 210.)

It is submitted that neither the telegram in question, if such had been produced, nor testimony regarding it, is admissible. It is true that it is not necessary to set forth in a conspiracy indictment all the overt acts relied upon, and further, that the prosecution is not limited to the overt acts charged. But it is also true that there must be some connection between the overt acts attempted to be proved and the conspiracy alleged. The indictment alleges that the conspiracy began in January, 1923, whereas the alleged act of sending the telegram was supposed to have been per-

formed a year previously. This telegram, with questions concerning it, was intended to establish dealings in Vancouver between the plaintiff in error Miller and defendant Talbot. Since the alleged telegram antedated the beginning of the conspiracy as alleged in the indictment, it was improper proof, and nothing concerning it should have been admitted.

In *United States* v. *Richards,* 149 Fed. 443, 452, the Court said:

> " * * * it must be established that the conspiracy which is charged to have existed and which is the gist of the action in this case had been formed before and was existing at the time of the commission of the overt act."

Also, in *United States* v. *Cole,* 153 Fed. 801, 804, it is said that the overt act required to constitute a conspiracy "* * * must be a *subsequent,* independent act, following a completed conspiracy, and done to carry into effect the object of the original combination."

X. Admission of testimony concerning contents of purported telegram violated the best evidence rule.

It has already been shown that anything done by either of the defendants prior to January 1, 1923, is irrelevant. But testimony concerning the telegram supposed to have been sent by defendant Talbot in December, 1922, was inadmissible for the further reason that the best evidence rule was violated. Nowhere in the transcript on appeal does it appear that the telegram in question was produced in court. And neither was any attempt made to lay a foundation for

the admission of secondary evidence to prove its contents. The rule has been stated as follows:

> "The best evidence of the contents of a telegram is the original message itself, and parol evidence of the contents of the message is admissible only where the original writing is lost or its absence is otherwise satisfactorily explained." (22 Corpus Juris, 989.)

In conclusion, it is submitted that the specifications of error herein contained are ground for ordering a new trial for the plaintiff in error Miller.

Respectfully,

CHAS. J. WISEMAN,
HUGH L. SMITH,
JAMES M. HANLEY,
Attorneys for Plaintiff in Error Jack Miller.

No. 4496

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 2

ALEXANDER B. STEWART, et al., *Plaintiffs in Error,* vs. UNITED STATES OF AMERICA, *Defendant in Error.*	}

BRIEF FOR PLAINTIFF IN ERROR, ALEXANDER B. STEWART.

G. M. SPICER,
Metropolitan Building, Long Beach,
C. W. PENDLETON,
Pacific Mutual Building, Los Angeles,
Attorneys for Plaintiff in Error,
Alexander B. Stewart.

HUGH F. KEON, JR.,
De Young Building, San Francisco,
EDWARD A. O'DEA,
Phelan Building, San Francisco,
Of Counsel.

FILED
FEB 18 1926
F. D. MONCKTO
C

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 4496

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER B. STEWART, et al.,
Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR, ALEXANDER B. STEWART.

I.

STATEMENT OF THE CASE.

The plaintiff in error, Alexander B. Stewart, who will be termed hereinafter as the defendant, was indicted by the Grand Jury of the Southern Division of the United States District Court, for the Southern District of California, with twelve others on the 13th day of June, 1924. The indictment contained four counts. The first count charged the defendants with a violation of Section 37 of the Criminal Code of the United States in entering into a conspiracy at or near the City of Los Angeles, County of Los Angeles, in the State and District above set forth, on or about the 1st day

of January, 1923, to violate in two particulars the Tariff Act of 1922 and in three particulars the Act of October 28, 1919. Ten overt acts are pleaded in said count in furtherance of the conspiracy alleged therein. (Trans. Rec., pages 11 to 20.) The second count set forth in the indictment attempted to charge that the defendants did "on or about the 22nd day of March, 1923, at the plant of the Curtis Corporation, in the City of Long Beach, County of Los Angeles, State and District aforesaid, knowingly, wilfully, unlawfully and feloniously and with the intent to defraud the revenues of the United States, smuggle and clandestinely bring into the United States from the Dominion of Canada, certain goods, wares and merchandise, to wit; intoxicating liquors containing alcohol in excess of one-half of one per cent by volume, more particularly described as follows, to wit; about 365 gallons of whiskey, 45 gallons of brandy, 15 gallons of vermouth, 24 gallons of gin, 24 gallons of benedictine and 15 gallons of champagne, on which there is a duty imposed by law and all of which merchandise was then and there subject to said duty by law; which said merchandise should have been invoiced, without then and there paying or accounting for said duty or any part thereof, and without having the said merchandise or any part thereof, invoiced; in violation of Section 593 of the Tariff Act of 1922". (Trans. Rec., pages 21, 22.) The third count attempted to charge that the defendants, at the same time and at the same place,

as set forth in the second count, "did knowingly, wilfully, and feloniously and with intent to defraud the revenues of the United States, smuggle and clandestinely bring, import and introduce into the United States, to wit: the State of California, at the County of Los Angeles, from a foreign country, to wit, the Dominion of Canada, certain goods, wares and merchandise, to wit; intoxicating liquors more fully described as follows, to wit: about 365 gallons of whiskey, 45 gallons of brandy, 15 gallons of vermouth, 24 gallons of gin, 24 gallons of benedictine and 15 gallons of champagne, on which there is a duty imposed by law; said intoxicating liquors then and there containing alcohol in excess of one-half of one per cent by volume, the importation of which said intoxicating liquors into the United States was then and there forbidden except on a permit issued therefor by the Commissioner of Internal Revenue of the United States, without having first obtained the permit from the said Commissioner of Internal Revenue of the United States to import and bring the said intoxicating liquors into the United States, that is to say, the said defendants did knowingly, wilfully, unlawfully and feloniously and without first obtaining a permit from the Commissioner of Internal Revenue of the United States, transport and clandestinely smuggle, carry and convey the said quantities of intoxicating liquors on board the gasoline power boat "Nagai" from the Dominion of Canada into the United States, at a point near

the City of Long Beach, County of Los Angeles, within the State, Division and District aforesaid; in violation of Section 593 and Section 813 of the Tariff Act of 1922." (Trans. Rec., pages 23 and 24.) The fourth count charged the defendants with another violation of Section 37 of the Criminal Code of the United States in entering into a conspiracy at or near the same place and at the same time set forth in the first count of the indictment to violate the Act of October 28, 1919, in three different respects at or near Los Angeles. In this count, seven overt acts are pleaded in furtherance of the conspiracy set forth therein. (Trans. Rec., pages 24 to 31.)

The defendant, Alexander B. Stewart, upon his arraignment pleaded "Not Guilty". (Trans. Rec., pages 32, 33.)

The cause proceeded to trial on the 21st day of January, 1925. After the impanelment of the jury, but before the taking of testimony, on the motion, it must be confessed of the attorneys for the defendants, joined in by counsel for the Government, the court ordered the words "feloniously and" stricken from the second and third counts of the indictment and further ordered the words "and feloniously" stricken out of another portion of the third count of the indictment. (Trans. Rec., pages 43 and 134.) A line was run through the words "feloniously and" in the second count of the indictment; lines were also run through the words

"feloniously and" and "and feloniously" in the third count of the indictment. The initials of some of the counsel for the defendants and the Government were placed on the indictment in each instance where the words set forth were stricken out as appears by the Transcript of the Record, pages 21-23-24. The purpose of the court for its action in striking out the objectionable words, was that the offenses charged in Counts II and III of the indictment were set forth as felonies, when in reality they were described by the Tariff Act of 1922 itself, as misdemeanors. However, the defendant, Stewart, was tried on an instrument purporting to be an indictment of the Grand Jury in two counts, of which at least, the court changed the nature of the offenses set forth therein without the consent of the Grand Jury returning the indictment or without re-submitting it to the Grand Jury for its further consideration. The defendant Stewart, was therefore tried on an indictment or instrument purporting to be such, which was not the indictment of the Grand Jury returning same.

During the trial the widest latitude was allowed the Government in introducing hearsay and other objectionable testimony, to substantiate the conspiracy charges set forth in the indictment, while no restriction of this testimony was made as to its application to the altered counts containing alleged substantive violations of the Tariff Act of 1922, or Stewart's connection therewith. As a

consequence, when the trial was concluded on the 31st day of January, 1925, the jury acquitted the defendant Stewart on the counts charging him and others with conspiracy, while it convicted him of the charges contained in counts two and three of the indictment as altered by the court (Trans. Rec., page 68), though the charges set forth in the last mentioned changed counts were designated and charged as overt acts numbers I, II and VI in furtherance of the conspiracy set forth in the first count of the indictment and as overt acts numbers V and VI in furtherance of the other conspiracy set forth in the fourth count of said indictment. (Trans. Rec., pages 15, 16, 18, 20, 21, 22, 23, 29 and 30.)

The cause was continued for judgment to the 14th day of February, 1925, at which time the defendant moved for a new trial and in arrest of judgment, each of which motions were ordered by the court denied, whereupon the court sentenced the defendant, Alexander B. Stewart, to pay a fine in the sum of Twenty-five Hundred Dollars on the second count of the indictment, as altered and to pay a fine of Five Thousand Dollars on the third count of the indictment, as altered, and stand committed to the Orange County jail for a period of four months on the amended third count.

A writ of error was thereafter sued out by plaintiff in error, Stewart, to review the judgment and proceedings of the trial court.

II.

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

The court erred in entering said judgment and imposing sentence upon said verdict of guilty in the manner and form as done.

II.

The court erred in entering judgment and imposing sentence upon said verdict of guilty on counts two and three of the indictment.

III.

The court erred in pronouncing judgment upon said verdict.

IV.

The verdict is contrary to law.

V.

The verdict is contrary to evidence.

VI.

The verdict is contrary to the law and the evidence.

III.

ARGUMENT.

I.

THE VERDICT WAS CONTRARY TO LAW. THE CONVICTION OF PLAINTIFF IN ERROR ON THE SECOND AND THIRD COUNTS OF THE INDICTMENT AS ALTERED BY THE COURT WAS A NULLITY.

The United States Grand Jury of the Southern Division of the United States District Court for the Southern District of California, an institution established by the Fifth Amendment to the United States Constitution, duly selected for service in the January, 1924 Term of the court for the Southern Division of the United States District Court of the Southern District of California, returned an indictment against plaintiff in error, Stewart, and others charging them with the commission of four infamous crimes set forth in as many counts. Each offense charged therein was punishable by a term of imprisonment, not exceeding two years and by the imposition of heavy fines.

Under Section 5541 of the Revised Statutes of the United States any of these offenses, no matter how characterized by Congress, was punishable in a State or Federal penitentiary if the sentence of the trial court exceeded a period longer than one year.

And it is the law, that crimes punishable in a state prison or Federal penitentiary, with or without hard labor are infamous crimes for which persons cannot be held to answer in the Federal courts

otherwise than on presentment or indictment of a Grand Jury.

> *Breede v. Powers,* 263 U. S. 4, on page 10;
> *United States v. Moreland,* 258 U. S. 433;
> *Mackin v. United States,* 117 U. S. 348;
> *Ex parte Wilson,* 114 U. S. 417;
> *Blanc v. United States,* 258 Fed. 921; C. C. A. 9th Cir.

But it is true, however, that counts two and three of the indictment as returned by the Grand Jury in the charging part of same designated the offenses set forth therein as felonies, in violation of Section 593 of the Tariff Act of September 21, 1922; 42 Stat. 982; when in fact the section last cited, describes these offenses as misdemeanors, or violations of the law not carrying with them a deprivation of civil rights or full rights of citizenship, though none the less infamous on account of the character of the punishment prescribed.

Upon the trial of the cause, upon the motion of counsel for the defendants, seconded by the United States Attorney, the court ordered the word "feloniously" stricken out where ever it appeared in either of said counts. (Trans. Rec., p. 134.)

These words were actually stricken from counts two and three of the indictment; in this behalf the indictment of the Grand Jury was actually altered by the permission and order of the court, without ordering the indictment re-submitted to the Grand Jury, which returned it, six months after its pre-

sentment and return and long after the life of the Grand Jury returning same had been spent.

The effect of the court's action was to change in a substantial manner the nature of the offenses charged in said counts as completely, as the nature of the charge of murder would be changed, if the court in that supposititious case had stricken out the words (malice aforethought) in an indictment charging that crime.

The Grand Jury in the instant case in counts two and three of its indictment intended to charge plaintiff in error, Stewart, and the other defendants with the crime of felony, because it was most probably advised by the United States Attorney that a violation of the Tariff Act constituted felony. It is not unreasonable to assume, that if the Grand Jurors were advised, that the violations of the Tariff Act were looked upon by the Congress passing the statute only as misdemeanors, that they would be very reluctant to indict the defendant Stewart for misdemeanors carrying with them penitentiary sentences. And who can say, that if they were properly advised in this regard, they would not have hesitated to charge the defendant Stewart with the crime of conspiracy (a felony) to commit two misdemeanors. It cannot be gainsaid, that they might have viewed the situation as the learned Chief Justice of the United States regards the policy of charging persons with conspiracies to commit mere misdemeanors.

The court's action, in causing the alteration of counts two and three of the indictment, was a flagrant usurpation of the functions of the Grand Jury, no matter what were the circumstances inducing its conduct. When the indictment was altered, in these counts, there was nothing for the court to try in that behalf. The court lost jurisdiction thereof as completely as though the indictment had been dismissed or a nolle prosequi entered. There was nothing before the court upon which it could hear evidence or pronounce sentence.

Nevertheless, the case proceeded to trial, verdict and sentence, and the defendant was acquitted of the counts charging conspiracy, but was convicted of the charges contained in the very counts altered by the court, and was illegally sentenced thereunder to a term of imprisonment in the county jail and to pay fines in the sum Seven Thousand Five Hundred Dollars. This question is a jurisdictional one, where the defendant Stewart could resort to the remedy of habeas corpus as in the case of *Ex parte Bain,* 121 U. S. page 1, if actually undergoing deprivation of liberty thereunder. It has been repeatedly held;

A Party Can Only Be Tried Upon the Indictment Found By the Grand Jury, and Especially Upon Its Language Found in the Charging Part of the Instrument. A Change in the Indictment Deprives the Court of the Power of Proceeding to Try the Accused. There is Nothing Before

THE COURT ON WHICH IT CAN HEAR EVIDENCE OR PRONOUNCE SENTENCE.

Ex parte Bain, 121 U. S. 1; 30 Law Ed. 849;
DeLucca v. United States, 299 Fed. 741; C. C. A. 2nd Circuit;
Katz v. United States, 273 Fed. 157; C. C. A. 1st Circuit;
Dodge v. United States, 258 Fed. 300; C. C. A. 2nd Circuit;
Naftzer v. United States, 200 Fed. 497; C. C. A. 8th Circuit;
United States v. Dembowsky, 252 Fed. 898;
United States v. Munday, 211 Fed. 536;
United States v. Harmon, 34 Fed. 872.

The case of *Ex parte Bain,* cited supra, is the leading case upon the subject matter under discussion. It is particularly valuable here, because it was decided by the United States Supreme Court on March 28, 1887, fifteen years after the enactment of Section 1025 of the Revised Statutes which section, was passed on June 1, 1872. The doctrines promulgated by the United States Supreme Court have never since been departed from, and have been followed and applied in all of the cases cited supra.

In the *Bain* case, there was an indictment containing a single count charging a number of defendants, including Bain, with violating a section of the Revised Statutes which governed the operation and control of banks and banking and

which required certain reports to be made in conformity with its mandates. In the indictment there appeared this allegation:

> "and that they, and each of them, made said false statement and report in manner and form as above set forth with intent to deceive *the Comptroller of the currency and* the agent appointed to examine the affairs of said association and to injure, deceive and defraud the United States, etc."

The words here italicized were in reality surplusage. Upon motion of counsel for the United States, the court ordered that the indictment be amended by striking out the words *"The Comptroller of the currency and"*. The question was taken to the United States Supreme Court on a petition for a Writ of Habeas Corpus, which was granted by the court.

Justice Miller, in a very learned opinion, wherein he reviewed exhaustively the many English and American authorities on the subject, in holding the indictment a nullity and the trial thereon less, concluded his decision in the following language:

> *"It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand*

jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney: for. if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime: for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer', he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by this court in Ex parte Lange, 85 U. S. 18 Wall. 163 (21:872); Ex parte Parks, 93 U. S. 18 (23:787); Ex parte Wilson (supra), and other cases."

Similarly the United States Circuit Court of Appeals of the Second Circuit held in the case of *Dodge v. United States,* 258 Fed. p. 300. In that

case, the facts are identical with the instant case, as far as the question under discussion is concerned. There the defendant was indicted for violations of the Espionage Act. The indictment contained four counts. The rest of the facts are cited with the law in the portion of the opinion which we will now quote: It is to be found on page 305 of Volume 258 of The Federal Reporter and is as follows:

> *"At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word 'mutiny' from the first paragraph of the second count. Counsel for defendant at once said: 'No objection.' The court granted the motion. This is now assigned for error. That it was error of the most serious kind is not to be doubted The rule is almost universally recognized, both in this country and in England, that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the court.*
>
> *The Supreme Court in Ex parte Bain, 121 U. S. 1; 7 Sup. Ct. 781; 30 L. Ed. 849, declared that it was beyond question that in the English courts indictments could not be amended, and that no authority had been cited in the American courts which sustained the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute. In that case the trial court amended the indictment by striking out six words as being surplusage. The Supreme Court held that this deprived the court of power to try the prisoner. There was only one count in the indictment in that case. And the court said:*

'The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered.'

"We therefore hold in the instant case that the amendment made in the first two counts deprived the court of power to proceed upon those counts; but this did not affect the right to try the defendant upon the third and fourth counts. As the jury acquitted on the fourth count, the question is as to the validity of the third count. That count is well drawn, and the conviction under that count must be sustained unless the Espionage Act is unconstitutional."

Again, the same Circuit Court of Appeals held in the case of *De Lucca v. United States*, 299 Fed. 744, as follows:

"The effect of the severance in a conspiracy indictment was to grant separate trials to the defendants accused in that indictment. The defendants remained the same and the indictment remained unchanged. Assuming that a severance had been granted, as argued, as to both indictments, still it was error to grant the consolidation of the indictments. The statute makes the test what appears on the face of the bills themselves. It does not depend in any degree upon the order in which the prosecutor intends to bring the defendants to trial. Both indictments charge crimes punishable by imprisonment for more than one year, and are therefore infamous crimes. Breede v. Powers, 263 U. S. 4; 44 Sup. Ct. 8; 68 L. Ed. ....; In re Classen, 140 U. S. 200; 11 Sup. Ct. 758; 35 L. Ed. 399. There were still accusations made against five defendants in one case and nine defendants in the other. Neither the court nor the government's attorney had the

> power to add anything to the indictment or to strike anything out of it. Ex parte Bain, 121 U. S. 1; 7 Sup. Ct. 781; 30 L. Ed. 849. The Fifth Amendment of the Constitution requires that the accusation should be that charged in the indictment as found by the grand jury. The only way it could be changed would be by resubmission to the grand jury."

Plaintiff in Error Stewart Could not Waive His Constitutional Right to be Tried for Infamous Crimes on the Indictment as Returned by the Grand Jury; Neither Could His Counsel Waive That Right for Him.

It is true, that if Stewart desired to do so, he could plead guilty to the charges contained in the indictment, but when he elected to go to trial, he could only be tried in the manner provided by the United States Constitution. His counsel, for instance, could not stipulate the trial court, the power to try him, without the aid of a jury. Neither could he be legally tried, even if he consented thereto, by a jury of less than twelve men. Any other rule would soon lead to the utter disregard of all constitutional rights, and guarantees.

This Circuit Court of Appeals in the case of *Blair v. The United States,* 241 Fed. 217, held

The constitutional right of a person charged with crime to a trial by jury is the right to a trial by jury according to the course of the common law, which right cannot be waived and a court is without power in a criminal case to instruct the jury

peremptorily to find the accused guilty, although the case is submitted on an agreed statement of facts, without other evidence.

The court holding on page 230 of the Report, as follows:

> "The constitutional right thus secured to one charged with crime means a trial by jury according to the course of the common law, which right cannot even be waived. Thompson v. Utah, 170 U. S. 343, 346, 349, 353; 18 Sup. Ct. 620; 42 Law. Ed. 1061; Freeman v. United States 227 Fed. 732; 142 C. C. A. 256. And in the case of Sparf and Hansen v. United States 156 U. S. 51, 105; 15 Sup. Ct. 273-294 (39 L. Ed. 343), the Supreme Court distinctly adjudged that:
>
> > 'It is not competent for the court, in a criminal case, to instruct the jury peremptorily to find the accused guilty of the offense as charged or of any criminal offense less than that charged.'
>
> "See, also, Atchison, T. and S. F. Ry. Co. v. United States, 172 Fed. 194; 96 C. C. A. 646; 27 L. R. A. (N. S.) 756; United States v. Taylor (C. C.), 11 Fed. 470."

The principle here laid down applies with equal force to the case at bar, unless the Sixth Amendment to the United States Constitution is of more vital importance to the protection of life, liberty and the pursuit of happiness than the Fifth Amendment to the said Constitution.

IV.

CONCLUSION.

It is respectfully submitted for the reasons stated in this brief, that the trial of plaintiff in error Stewart on counts two and three of the indictment, was a nullity from the time, that the court, by its order, altered the charging portion of each of said counts. And for that reason alone, the judgment of conviction of the defendant, Alexander B. Stewart on said counts two and three should be reversed.

Dated, February 17, 1926.

G. M. Spicer,
C. W. Pendleton,
Attorneys for Plaintiff in Error, Alexander B. Stewart.

Hugh F. Keon, Jr.,
Edward A. O'Dea,
Of Counsel.

No. 4496.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT. 3

Alexander B. Stewart, Frank Kubota, Jack Miller and Oscar Lund,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, UNITED STATES OF AMERICA.

Samuel W. McNabb,
United States Attorney,
Mark L. Herron,
Special Assistant U. S. Attorney.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

FILED
MAR - 8 1926

No. 4496.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Alexander B. Stewart, Frank Kubota, Jack Miller and Oscar Lund,
Plaintiffs in Error,
vs.
United States of America,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, UNITED STATES OF AMERICA.

I.

The Indictment.

The plaintiff in error, Jack Miller, hereinafter called the defendant, was indicted June 13, 1924, together with several other defendants. The indictment contained four counts; the first count charging conspiracy to violate section 3 of title II of the National Prohibition Act and section 593 of the Tariff Act of 1922; the second, charging a violation of section 593 of the Tariff Act of 1922; the third a direct violation of cer-

tain other requirements of section 593 of the Tariff Act of 1922; the fourth, a conspiracy to violate section 3, title II, of the National Prohibition Act.

II.

Statement of Facts.

Briefly stated, the record shows that one George Cheney was the owner of a small ranch in Topanga Canyon, Los Angeles County, California. That early in 1923, certain of those persons charged jointly with defendant Miller approached Cheney, and made arrangements to and did construct a warehouse on the ranch which was used for the storage of liquor. That defendant Miller, and two co-defendants came to the ranch and went into the warehouse at a time when there was liquor in it. That the liquor stored at the ranch was stolen by certain "hi jackers", and that after this theft occurred Miller, accompanied by the same co-defendants, again came to the ranch, was told what had occurred, looked into the warehouse and went away. [Tr. of Rec. 135, 136.]

That on March 22, 1923, there was unloaded upon the wharf of the Curtis Corporation at Long Beach, California, a large quantity of intoxicating liquors, which had been there transported aboard the Japanese fishing vessel "Nagai". That this liquor was reloaded into two trucks and a touring car, and that certain police officers discovered the occurrence, raided the Curtis plant, and after several shots had been fired, placed under arrest the persons there found.

That Police Officer Costegan saw defendant Miller in front of the Curtis plant walking toward it. That Miller stopped the officer and asked him where the shooting was, whereupon the officer placed Miller under arrest. [Tr. Rec. 147.]

The record shows that on the following day Police Officer O. M. Murray interviewed defendant Miller in the Long Beach jail and that Miller then told him he was a bookkeeper from Astoria, Oregon, and that he had come to Long Beach the day before the arrest [Tr. of Rec. 146], which statement was untrue.

That later Miller made a truthful statement to Prohibition Agent Dolley saying that he, Miller, was treasurer of the Independent Exporters Limited, a wholesale liquor house of Vancouver. [Tr. of Rec. 163.] That certain of the co-defendants had some time previously come to him in Vancouver and purchased a cargo of liquor to be brought to Los Angeles on the boat Borealis; that they had made a down payment of ten thousand dollars on the cargo, and that he, Miller, had come to Los Angeles for the purpose of collecting additional moneys and of giving to the said defendants orders on the captain of the Borealis to release liquors to the amount of the moneys so paid; that Miller showed Dolley a note book (U. S. Exhibit No. 17) evidencing such payments, and said that he, Miller, had arranged with the defendant Kubota to transport the liquor from the Borealis. He also there identified U. S. Exhibit No. 19 as representing an invoice of the cargo of the Borealis as it left Vancouver [Tr. of Rec.

163, 164, 165]; said that he was in the office of the Curtis plant while the liquor was being unloaded, and upon hearing certain shots went out upon the street, where he was arrested.

III.

Specifications of Error.

Defendant relies upon ten specifications of alleged error, each of which we will consider in the order it is raised by him.

Argument.

I.

Counsel for defendant Miller assert that "the testimony of a co-conspirator should be regarded with suspicion, and contend that the defendant was prejudiced to the extent that the testimony of co-defendants Cheney and Nagai, alleged by them to be uncorroborated, was relied upon.

No exception was taken to the instructions of the court, nor was any other or additional instruction upon this point requested, and it is therefore to be presumed that the court correctly instructed the jury upon the law relating to the testimony of co-conspirators,

> Fuller v. Schuh-Mason Lumber Co., 6 Fed. (2nd) 531,

the appellate court not being required to pass on questions which have not been properly preserved in the trial court.

> Short v. U. S., 221 Fed. 248;
> Robilio v. U. S., 291 Fed. 975;
> Feinberg v. U. S., 2 Fed. (2nd) 955.

While Federal courts have held that the testimony of an accomplice, although entirely without corroboration, will support a conviction of one accused of crime, (U. S. v. Lancaster, 44 Fed. 896) the trial court gave the following instruction requested by defendant:

"You are instructed that in a case such as this, the testimony of a conspirator, in behalf of the prosecution, should be viewed with suspicion and should be fully corroborated to warrant conviction." [Tr. Rec. 72.]

Moreover, in point of fact the testimony of both witnesses was substantially corroborated. The testimony of Cheney to the effect that he had seen Miller on his premises was corroborated by the testimony of Mrs. Valeria Cheney, who testified

"I did not see Miller and Talbot until after the high jacking, I never saw any of the defendants other than those first named." [Tr. Rec. 137.]

Defendants assert that Cheney said he only *thought* the building alleged to have been erected by the conspirators, contained liquor; the record does not stop with the employment of the word complained of but shows Cheney's testimony to be

"Miller, Talbot and Lund went into the warehouse and at that time there was liquor in it * * * Miller came out right after the hi-jacking * * * I said it was this hi-jacking party that had taken the stuff away and they went and looked into the building and turned around and went away."

Any possible doubt as to the character of the 'stuff" referred to is set at rest by the testimony of Charles G. Baird, a transfer man, who helped the "hi-jackers" take it away from the Topanga Canyon warehouse, believing them to be prohibition agents:

"I think we got about 135 or 140 cases of liquor and brought them to 820 West 3rd St. I drank some of the liquor and know that it was whiskey." [Tr. Rec. 140.]

As to the testimony of Nagai, defendant complains that Nagai only *thought* the defendant Miller was on his boat. While he used the word *thought*, he later testified:

"When I loaded up the liquor from the big boat, the crew of the big boat, and not Mr. Miller, told me to load. Mr. Miller was in my boat at that time, but they told me from above to load up, so I went down, cleaned up the stuff and loaded up. Mr. Miller rode upon my boat with me, and rode back with me after I had loaded the liquor * * * I was paid about $150 or $160 for carrying this liquor on my boat. I am not quite sure who gave it to me. Well, as near as I can remember it was Kubota or Mr. Miller, I am not sure." [Tr. Rec. 140.]

Moreover, Miller himself, according to the record, admitted a connection with the traffic referred to, stating to Prohibition Agent Dolley that he had an agreement with Kubota to pay him $4.00 a case for the transportation of this liquor, and that Kubota had hired another Jap to whom he paid $1.00 a case for doing the actual work. [Tr. Rec. 165.]

Of course the record shows that the testimony of Nagai and Cheney was corroborated by the apprehension of Miller in front of the very place where the liquor was being unloaded, by the note book and invoices received in evidence, by the telegrams sent by him and by the inherent improbability of the story told by him in his own defense.

II.

Defendants assert that "opinion evidence is inadmissible" and complain that Nagai testified:

"We loaded boxes and I *presume* it was liquor" omitting to call to the court's attention the fact that the trial court then asked:

"Q. Why did you presume it was liquor?

A. I didn't know, I couldn't see the writing on it, so I didn't know what it was, but *afterwards I found out it was liquor.*"

As of course did the officers of the law, when they seized it loaded upon automobiles at the Curtis plant.

III.

It is the third position of defendants that "a witness may refer to notes to refresh his memory, but that he is not allowed to read them as his testimony."

With this position we have no quarrel, asserting simply that the record shows Mr. Imbrose did not "read his notes as his testimony" as they attempt by a somewhat tortuous process of reasoning, to show. The record is plain and discloses that Mr. Imbros' testimony was:

"Q. Will an examination of these notes which you have now so refresh your recollection as to give you a present recollection of that which then occurred?

A. Yes, sir." [Tr. 149.]

"Q. Now, by referring to these notes, can you so refresh your present recollection as to now remember what happened then?

A. Yes, *by looking over* these notes." [Tr. 150.]

"The Court: I understand, Mr. Imbros, that you have no present, independent memory of this conversation?

A. Well, it has been so long since this happened, and I have had so many cases in the meantime, that I can't think of them all without having notations of them.

The Court: And it is therefore necessary for you to *refer* to these notations?

A. Yes, sir." [Tr. 153.]

"The Court: All right, you may refresh your recollection if it does refresh your recollection. If you have any independent recollection outside of the notes, of course you can't use them. If you have not you may use your notes to refresh your recollection." [Tr. Rec. 156.]

Moreover, an examination of the testimony given by Mr. Imbros will make plain that the defendant Miller was not mentioned in it, and that it had no bearing upon him direct or indirect and could not under any possible theory operate to his prejudice.

IV.

It is the fourth assertion of counsel that "evidence of other crimes is not competent to prove the specific crime charged."

While we concede that this is as a general proposition, the law, the question to which the answer complained of was *not* as defendant states in his brief asked by the prosecution but was on the contrary asked by Mr. Wright one of defense counsel and alluded upon cross-examination of Harold Dolley, one of the government's witnesses.

"Q. Well, now, he had never been in jail, had he, up to this time?

A. I understand he served five years in Vancouver."

The answer given was responsive to a question asked by defense counsel, and we submit that counsel having embarked on a fishing expedition should not complain of the catch. A defendant cannot complain of error in the admission of evidence which he himself draws out.

State v. Hamey, 57 L. R. A. 846;

Johnson v. Walker, 1 L. R. A. (N. S.) 470.

V.

It is the fifth position of counsel for defendant that "evidence of other crimes is unduly prejudicial to defendant" and they assert that "the erroneous admission of evidence against an accused will be presumed

to be prejudicial unless it is made to appear beyond a doubt harmless and cite:

Sprinkle v. U. S., 150 Fed. 56;
Ayle v. U. S., 205 Fed. 542;
Miller v. Territory of Okla., 149 Fed. 330;
Williams v. U. S., 158 Fed. 30."

All of these cases were decided prior to the amendment of section 269 of the Judicial Code which provides in part:

> "On the hearing of any appeal * * * civil or criminal * * * the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." (J. C. 269.)

In view of this amendment the burden is on the plaintiff in error to show that error in the admission of testimony was prejudicial.

Simpson v. U. S., 289 Fed. 188.

An examination of the record discloses they have not met this burden. The invited answer alleged to be error is beyond doubt harmless. No attempt was made by the government to show any previous crime on the part of Miller; nothing appears in the record save the answer by Dolley upon cross-examination above referred to that he "understood he (Miller) had served five years in Vancouver." Obviously, the mere expression on the part of *one* witness called by the government as to his *understanding* of the fact that Miller

had been in jail in Vancouver, B. C., without stating his "understanding" of the reason for his being there, when such "understanding" was alluded upon cross examination and not followed up by the government, could not cause the jury to be of the opinion that by reason of that "understanding" Miller was guilty of the offenses against the laws of the United States charged.

The statement of Dolley, if error, is we contend not available to defendant, for:

> "When it is plain that there is no injury, the exception is not available."
>
> Sawyer v. U. S., 202 U. S. 150;
> Willmering v. U. S., 4 F (2nd) 209.

The record in its entirety moreover shows the evidence of the guilt of the defendant to be so strong and convincing that one cannot see how even the direct imputation of one or more additional crimes could have affected the verdict. In such a case this court has held error does not justify reversal.

> Whitaker v. U. S., 5 F (2nd) 546.

VI.

It is the sixth position of defendant that an admission of guilt made by the defendant outside of court is inadmissible, if it was made under circumstances involving such a hope of benefit as was likely to induce a false confession.

No objection was made upon trial to the testimony of Dolley, nor was any motion made to strike it out.

The defendant cannot therefore now complain of its admission.

> Short v. U. S., 221 F 248;
> Robirlio v. U. S., 291 F 975;
> Feinberg v. U. S., 2 F (2nd) 955.

The record moreover shows that the statements made by Miller to Dolley were not made "under circumstances involving such a hope of benefit as was likely to induce a false confession"; Dolley testified:

"By Mr. Wright: At that time was there any arrangement made as to what Mr. Miller would receive; or what benefit he would receive, if he went to Vancouver with you?

A. No, sir; I told Mr. Miller from the very time I first talked to him * * * that I was not in a position to offer him anything; that he would have to take his chances." [Tr. Rec. 170.]

Miller had himself been an officer, testifying:

"I was a member of the Northwest Mounted Police for a period of four years and seven months, during which time I had occasion to arrest approximately 40 or 50 violators of the law, some of whom undoubtedly made statements, admissions and confessions to me."

He knew Dolley was an officer when he made the statements concerning which Dolley testified:

"When I talked to Dolley I thought he was a federal officer."

The testimony of Miller himself shows that no such hope of benefit existed as his counsel now assert.

"Dolley did not threaten me in any way, no violence was used toward me and no offer of reward held out to me." [Tr. 195.]

VII.

Defendants next assert that the court permitted improper redirect examination.

That the court did not abuse its discretion in allowing the examination complained of is we submit, apparent from the examination of the record, the court having merely permitted Nunn to be asked upon redirect examination to recount a conversation had by him with Knowlton at a time, place and under circumstances concerning which Nunn had testified upon direct examination. It is difficult to see how prejudice could have resulted to any defendant from the court's ruling; certainly as the conversation admitted had no connection, direct or indirect, with the defendant Miller, its admission ever if error could not prejudice him.

VIII.

Defendant's eighth objection is that a certified transcript of the proceedings in a case brought by the state of California v. Knowlton alias King was offered and received in evidence.

It was offered and received as tending to show that Knowlton, alias King, was arrested transporting liquor along a highway leading from Topanga Canyon—the place where the indictment charged the defendants had conspired to and had stored liquor, as a circumstance

tending to connect Knowlton with the liquor there stored. It was a circumstance, therefore, relevant.

The certified transcript referred to had no reference direct or indirect to defendant Miller; did not in any wise tend to connect him with any of the offenses charged in the indictment. Its introduction therefore, even if error, could not have been perjudicial as to him.

IX.

Defendant's ninth exception relates to a question asked by counsel for the government as to the sending of a telegram December 26, 1922, the indictment alleging the conspiracy to have been formed in January, 1923.

Conceding that "the Overt Act required * * * must be a subsequent, independent act, following a complete conspiracy, and done to carry into effect the object of the conspiracy" the government did not charge, nor attempt to prove, the sending of such a telegram as an Overt Act.

The only reference to such a telegram is found in a question addressed to the defendant Talbot in an attempt upon cross-examination to prove the falsity of the following statement made by him:

"I never did have any business dealings with Mr. Jack Miller." [Tr. Rec. 211.]

The record shows that Jack Miller testified that he had sent a certain telegram to A. L. McClary, *802 Vancouver Block, Vancouver,* reading:

"Will be home next week. Everything ok. Will have all moneys with me. Stop. If any Perfect arrives keep that for me. Must have about five hundred."

Signed J. Miller"

In an attempt to show by cross-examination that Talbot had business dealings with Miller at the place the government contended was Miller's office, *802 Vancouver Block, Vancouver,* Talbot was asked the question complained of:

"Q. Did you, then, from Vancouver, send a telegram to Mrs. Hazel Talbot, 6575 Fountain Avenue, Los Angeles, California, reading "Arrived at Vancouver this morning. Am all right. Will wire you when I leave. *Address 802 Vancouver Block* Love, Larry." [Tr. 211.]

to which Talbot replied that he did not remember, and did not know whether the office of the defendant Jack Miller is located at 802 Vancouver Block. [Tr. 213.]

The matter was pursued no further and no attempt made by the government to show that such a telegram was in fact sent.

Obviously, the question asked was by way of proper cross-examination to show the falsity of a statement testified to in chief.

X.

It is the tenth position of defendant that the "admission of testimony concerning contents of purported telegram violated the best evidence rule."

The complete answer to this contention is to be found in the fact that no evidence "concerning the contents of purported telegram" was offered or received. The witness was asked if a telegram of a certain tenor was sent. He testified that he did not remember and the matter ended there.

Conclusion.

It is respectfully submitted that the alleged errors complained of having been shown to be unsubstantial, this case falls squarely within the rule that "only a very plain and substantial error of law in rulings on evidence and instructions will warrant upsetting a verdict based on persuasive circumstantial evidence where the jury obviously declined to believe defendant's testimony.

295 Fed. 447.

We assert the circumstances surrounding defendant's arrest, his own statements thereafter admitting facts which if true, established his guilt, the inherent improbability of the testimony given by him upon the witness stand so operate as to require that the conviction and judgment be affirmed.

Respectfully,

Samuel W. McNabb,
United States Attorney.

Mark L. Herron,
Special Assistant U. S. Attorney.

No. 4496.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Alexander B. Stewart, et al.,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, UNITED STATES OF AMERICA.

SAMUEL W. MCNABB,
United States Attorney,
MARK L. HERRON,
Special Assistant U. S. Attorney.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

FILED
MAR - 192
F. D. MONCK

No. 4496.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Alexander B. Stewart, et al.,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR, UNITED STATES OF AMERICA.

I.

The Indictment.

The plaintiff in error, Alexander B. Stewart, hereinafter called the defendant, was indicted June 13, 1924, together with several other defendants. The indictment contained four counts: The first count charging conspiracy to violate Section 3 of Title II of the National Prohibition Act and Section 593 of the Tariff Act of 1922; the second, charging a direct violation of Section 593 of the Tariff Act of 1922;

the third, a direct violation of certain other provisions of the Tariff Act of 1922; the fourth, a conspiracy to violate Section 3, Title II of the National Prohibition Act. Defendant was found not guilty of the offenses charged in counts one and four and guilty of those charged in two and three.

II.

Statement of Facts.

Summarized briefly, the record shows that on the morning of March 22, 1923, about 365 gallons of whiskey, 45 gallons of brandy, 15 gallons of vermouth, 24 gallons of gin, 24 gallons of benedictine and 15 gallons of champagne were landed on the wharf of the Curtis Corporation of Long Beach, California, of which corporation the defendant Alexander B. Stewart was president.

That this liquor was unloaded from a fishing vessel, the "Nagai", upon which it had been transported from the mother-ship "Borealis" then lying near the Anacapa Islands. That this liquor so unloaded, with the exception of five cases, which were placed with the knowledge of defendant, Stewart, in Stewart's automobile, was loaded into two trucks; that when the loading had been completed, the defendant Stewart drove his car containing the said five cases of liquor out from the yard of the Curtis Corporation for the purpose of conveying the liquor to his home, was stopped, placed under arrest and the plant of the Curtis Corporation raided by police officers and the persons found there placed under arrest.

Upon the trial defendant Stewart testified as a witness upon his own behalf and stated in part that on the afternoon of March 21, 1922, he saw Frank Kubota, one of the co-defendants indicted jointly with Stewart; that Kubota stated he had a friend bringing a load of liquor into the harbor that night and wanted to use the docks of the Curtis plant to unload it; that he, Stewart, refused to permit this to be done; that that evening just as he was retiring, he received a telephone call from Kubota, who stated that he had a boat that wanted to drop a net and that he, Kubota, wanted to see Stewart down there; that he immediately went to the dock and saw a boat alongside thereof, from which two Japanese were unloading liquor, there being at that time several cases on the dock; that he protested but at the same time did not want to offend Kubota, as he was a leader among the Japanese, upon whom the Curtis cannery was dependent for its supply of fish, and in consequence feared to report the occurrence to the authorities; that he therefore told Kubota to get the stuff away as quickly as he could, and said substantially the same thing to a white man giving the name of Morris, who appeared to be in charge of the landing operations.

That on one of his trips to the dock to investigate the progress of the loading of the trucks, one of the men stated he wanted to give Stewart some liquor as Stewart "had been decent with them"; that Stewart then got his automobile, which up to this time had been parked outside the yard of the Curtis

plant, and drove it into the yard to give the boys the "opportunity of putting into the machine the liquor" that they stated they wanted to "give him"; that upon returning from the dock the liquor had been placed in his car and that he had no agreement or understanding with any of the defendants that as a consideration for his permitting them to land the liquor, he should receive liquor, and was paid no money for so doing. [Tr. Rec. 213-219.]

Accepting this statement as true, disregarding the suspicious circumstance that Stewart, the president, Albert C. Leahy, the production manager and Victor C. Lord, general sales manager of the Curtis Corporation, were all at the plant at 2:00 a. m.; disregarding the fact that the night watchman was sent home about 10 o'clock in the evening, and his place taken by Lord, the general sales manager, circumstances strongly indicating foreknowledge on his part, it is obvious that defendant Stewart, was by his own testimony guilty of the offenses charged in the second and third count of the indictment.

III.

Specifications of Error Relied Upon.

That Stewart is guilty upon the merits is apparently conceded by defendant's brief, which without any consideration of the conviction upon its merits, urges upon this court for the first time that the conviction of the defendant was a nullity because of the alleged altering by the court, at Stewart's request, of the second and third counts of the indictment.

IV.

Circumstances of the Alleged Altering.

A

The indictment was returned and filed June 13, 1924; defendant Stewart entered his plea of not guilty on August 11, 1924; the cause came on for trial January 20, 1925; the jury was selected and sworn; and on January 21, 1925, the defendants filed a motion to strike from the indictment the words "feloniously and", the words "section 813" and the words 'the Tariff Act of 1922". [Tr. Rec. 43-47.] This document, *the written motion was signed by all of the counsel for defendants, including Geo. Spicer and C. W. Pendleton, counsel for defendant, Stewart.* The circumstances leading to the change in the indictment appear from the record as follows:

"By the Court: I think as to the two counts which charge a substantive violation of the Act and do not charge a conspiracy to violate the Act, that the motion will be granted.

Mr. Herron: The government has no objection."

The court having granted the motion, a line was drawn through the objectionable words *by counsel, not by the court,* and initialed by counsel both for the defense and for the government, the record showing:

"By the Court: I think gentleman, you had better take this indictment and make the changes by interlineation in accordance with the ruling." [Tr. Rec. 134.]

Position of the Government.

It is the position of the government that the granting of the motion of defendant Stewart, and the subsequent drawing by counsel of a line through the words objected to amounted to merely the abandonment or suppression of surplusage and not to an amendment of the indictment. A mere reading of the counts upon which defendant Stewart was convicted will establish the truth of this statement. Read with the words omitted, the indictment charges:

"* * * the defendants * * * did knowingly, willfully, unlawfully, and with the intent to defraud the revenues of the United States, smuggle, etc." [Tr. Rec. 23.]

Read with the words included, the indictment charges:

"* * * the defendants * * * did knowingly, willfully, unlawfully *and feloniously* and with intent to defraud the revenues of the United States, smuggle, etc."

Section 593 of the Tariff Act cited in the second and third counts of the indictment expressly declares the offenses therein denounced to be a misdemeanor. The use of the word "feloniously" did not and could not change the character or nature of the offense and therefore can only be surplusage. The defendant knew to the same extent before and after the granting of his motion what he was accused of. He was neither mislead nor prejudiced by it. Any defense under the indictment as it stood before the granting

of his motion was equally available after the motion was granted; any evidence he had was equally applicable to the indictment in the one form or the other; the transaction charged was not altered by the granting of the motion but remained precisely the same, as is evidenced by the fact that no necessity for a new or different plea was suggested by the defendant.

The fact that the defendant himself made the motion for the amendment and that he permitted himself, without objection, to be tried, and thus embraced the opportunity of possible aquittal; that he did not urge the granting of his motion as ground for a new trial upon his motion therefor, but on the contrary raised the point for the first time upon this appeal and did not expressly urge the objection even as one of the specifications of error herein relied upon demonstrates that the defendant did not feel an error had been committed, nor that he had suffered prejudice to his substantial rights by reason of the granting of the motion.

V.

Upon the Doctrine Claimed To Be Announced in the Bain Case, 121 U. S., 1, That Any Change Whatsoever Whether of Substance or of Form Made by the Court in an Indictment Destroys the Validity Thereof, and Divests the Court of Jurisdiction, Defendants Contend That the Counts of the Indictment Upon Which Stewart Was Convicted Were a Nullity.

An examination of the Bain case discloses that it is not applicable to the facts involved in the case at bar and does not sustain the position of the de-

fendant. In the Bain case the court struck from an indictment charging that the defendants and each of them "made said false statement and report in manner and form as above set forth with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of said association", "on motion of the United States by counsel" and "the Comptroller of the Currency and".

The Supreme Court in considering the effect of the amendment said:

> "While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the Comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the Comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the Comptroller, but was not convinced that it was made to deceive anybody else? And how can it be

> said that, with these words stricken out, it is the indictment which was found by the grand jury?"

The above statement by the court is tantamount to a finding that the words 'the Comptroller of the Currency and" might not, under the circumstances of that case, have been and probably were not surplusage, because it was "not impossible, nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive". In other words, the court found that the words stricken were material and might reasonably have been intended by the grand jury to express its matured decision as to the person whom the defendants purposed to deceive.

As a further distinction between the Bain case and the instant case, it should be noted that the motion requesting the amendment to the indictment in the Bain case was made "upon motion of the United States by counsel", while in the case at bar it was made by the defendant, without objection on the part of the government, and this court should be extremely reluctant, unless it is unmistakably convinced of the soundness of defendant's contention, to permit him to profit by his own invited error, if error it can be said to be.

The circumstances in the case at bar are not unlike the circumstances in Goto v. Lane, 265 U. S. 402, where the distinctive "or" was used in several instances in the indictment where the conjunctive "and"

doubtless should have been used. The defendants and their counsel stipulated in writing with the prosecuting officers that the indictment should be "considered and understood" as "reading in the conjunctive instead of the disjunctive". The judge endorsed his approval on the stipulation and it was filed in the cause, but no change was made in the indictment itself.

True, in the case at bar the indictment itself was changed by the hand of counsel for defendant and was initialed by both counsel for the defendant and the government but all of this was done at the solicitation of the defendant, the United States District Attorney, as stated in defendant's brief, "seconding" the motion.

In our opinion these acts amounted to nothing more or less than a stipulation between counsel for the respective parties, which was approved by the court, as in Goto v. Lane, *supra,* where it was said by the Supreme Court of the United States:

> "The purpose of the stipulation was not to alter or change the indictment, but to show that the parties construed and understood the accusation in a particular way, and desired the court to do the same. *Had the court done so without stipulation, that might have been an error in the exercise of jurisdiction, but it would not have worked an entire disability to proceed to a trial and judgment. And had the accused been acquitted, it hardly would be said that the acquittal was void. The stipulation did not alter the situation in these respects."*

The above language was used by the Supreme Court in distinguishing the Bain case, upon which the petitioners in that case before the court, as in this, relied for reversal.

VI.

Assuming, as Claimed by the Defendant, That the Court Had No Power to Amend the Indictment by Striking the Words "Feloniously and" Therefrom, it Follows, it Seems to Us, That the Attempted Amendment Was Not Effectuated, but Was a Vain Act on the Part of the Court.

An act which a court has no power or authority to do, is a void act, and insofar as such an act attempts to command or permit a thing to be done, it is no act at all. The act of counsel in drawing a line through the words "feloniously and" and by that method attempting to eliminate said words from the indictment, amounts to the independent act of counsel, entirely devoid of judicial effect.

Conclusion.

The modern conception of our jurisprudence no longer favors reversal of causes upon technical errors not effecting substantial rights, and in this connection we respectfully call the court's attention to Section 269 of the Judicial Code, as amended February 26, 1919, which declares that:

> "On the hearing of an appeal * * * civil or criminal * * * the court shall give judgment after an examination of the entire record

> before the court, without regard to technical errors, defects, exceptions, which do not affect the substantial rights of the parties."

In view of the foregoing, can it be said that the defendant Stewart was deprived of the rights accorded every American citizen under the fifth amendment to the Constitution of the United States "not to be held to answer for a capital or otherwise infamous crime, unless on the presentment or indictment of a grand jury"?

Looking at the question in the light of the expression of Congress, contained in the language of Section 269 of the Judicial Code, and considering it from the standpoint of the modern tendency to more liberally interpret and apply our laws in order to effectuate substantial justice without regard to superficial or technical errors, we submit that an examination of the record will readily convince this court that that question must be answered in the negative and the judgment of the lower court sustained.

Dated March 5th, 1926.

SAMUEL W. McNABB,
United States Attorney,
MARK L. HERRON,
Special Assistant U. S. Attorney.

No. 4501

United States

Circuit Court of Appeals

For the Ninth Circuit.

PORT GARDNER INVESTMENT COMPANY,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILED
MAR 10 1925

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4501

United States

Circuit Court of Appeals

For the Ninth Circuit.

PORT GARDNER INVESTMENT COMPANY,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Answer 4

Assignment of Errors.......................... 99

Bill of Exceptions.......................... 29

Certificate of Clerk U. S. District Court to Transcript of Record.................... 122

Citation on Writ of Error.................. 127

Claim of Port Gardner Investment Company, a Corporation 6

Claimant's Requested Instructions........... 16

Claimant's Requested Additional Instructions 23

Decree 24

EXHIBITS:

Exhibit "A" Attached to Claim of Port Gardner Investment Company, a Corporation—Conditional Sales Contract Dated March 15, 1924, Between L. L. Neadeau and W. S. Guy Motor Sales 10

Exhibit "A"—Search-warrant 96

Claimant's Exhibit "B"—Conditional Sales Contract Dated March 15, 1924, Between L. L. Neadeau and W. S. Guy Motor Sales.................. 89

Index. Page

Information 1
Instructions of the Court to the Jury........ 72
Names and Addresses of Counsel............. 1
Order Extending Time for Preparing and Serving Bill of Exceptions to and Including February 3, 1925.................... 28
Order Granting Writ of Error and Fixing Amount of Bond......................... 118
Order Settling Bill of Exceptions............ 89
Petition for Order Allowing Writ of Error... 98
Praecipe for Transcript of Record.......... 121
Stipulation Extending Time for Preparing and Serving Bill of Exceptions to and Including February 3, 1925.................... 27
Supersedeas and Cost Bond.................. 119

TESTIMONY ON BEHALF OF CLAIMANT:

NEADEAU, L. L. 64
Cross-examination 69

TESTIMONY ON BEHALF OF LIBELANT:

JOHNSON, JAMES A. 42
Cross-examination 44
KLINE, C. W. 44
LEITCH, S. E. 55
Cross-examination 58
MILLER, WALLACE C. 46
Cross-examination 47
SIMMONS, J. M. 30
Cross-examination 35

Index. Page

TESTIMONY ON BEHALF OF LIBEL-
ANT—Continued:
Redirect Examination 41
WHITNEY, W. M. 47
Cross-examination 49
Cross-examination (Resumed) 51
Verdict 24
Writ of Error 124

NAMES AND ADDRESSES OF COUNSEL.

Attorneys for Plaintiff in Error:

GRINSTEAD, LAUBE & LAUGHLIN, 1407–18 Dexter Horton Bldg., Seattle, Washington.

THOMAS E. DAVIS, 1407–18 Dexter Horton Bldg., Seattle, Washington.

Attorneys for Defendant in Error:

THOMAS P. REVELLE, 310 Federal Building, Seattle, Washington.

JOHN W. HOAR, 303 Federal Building, Seattle, Washington. [1*]

INFORMATION.

To the Honorable, the Judge of the District Court of the United States for the Western District of Washington:

Now comes J. W. Hoar, Special Assistant United States Attorney for the Western District of Washington, who prosecutes for and on behalf of the United States of America, and exhibits this information against one Jewett Sedan Automobile, Washington License No. 178080, Engine No. 44079, and tools and accessories, and Luther L. Neadeau, and against all persons lawfully intervening for their interest therein; which aforesaid property was duly seized in the aforesaid district and divi-

*Page-number appearing at foot of page of original certified Transcript of Record.

sion on the 9th day of August, 1924, by W. M. Whitney, a Deputy Collector of Internal Revenue for the State of Washington, and an officer of the law, and is still held in custody within said district and division in pursuance of such seizure; and thereupon the said Assistant [2] United States Attorney doth allege and give the Court to understand as follows:

That on or about the 9th day of August, 1924, at a point about three miles north of the town of Monroe, near the highway bridge over Skykomish River on Monroe-Duval road, in the County of Snohomish, in the State of Washington, and within the Northern Division of the Western District of Washington, and before said seizure, the said property above described was by Luther L. Neadeau, used in the removal, and for the deposit and concealment of a large quantity of distilled spirits, to wit: moonshine whiskey or distilled spirits, the exact quantity and character of said distilled spirits being to the informant unknown, with intent to defraud the United States of the tax thereon, the said distilled spirits then and there being a commodity for which and in respect whereof a tax theretofore had been and then was imposed by the laws of the United States, which tax had not been paid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WHEREFORE, the said Assistant United States Attorney for the Western District of Washington, who prosecutes as aforesaid for the United

States, prays that due process of law may be awarded in this behalf, to enforce the forfeiture of said conveyance, to wit, One Jewett Sedan Automobile, Washington License No. 178080, Engine No. 44079, and tools and accessories, so seized as aforesaid, and to give notice to all persons concerned to appear on the return date of said process to show cause, if any they have, why said forfeiture should not be adjudged.

THOS. P. REVELLE,
United States Attorney.
J. W. HOAR,
Assistant United States Attorney. [3]

United States of America,
Western District of Washington,
Northern Division,—ss.

J. W. Hoar, being first duly sworn on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the Western District of Washington, and as such makes this verification to the foregoing information; that he knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

J. W. HOAR.

Subscribed and sworn to before me this 16th day of September, 1924.

[Seal] S. E. LEITCH,
Deputy Clerk, U. S. District Court, Western District of Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 17, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [4]

ANSWER.

Comes now Port Gardner Investment Company, a corporation, the claimant herein, intervening for its interests in the above-named automobile, and for answer to the libel of information filed herein, admits, denies and alleges as follows:

I.

On information and belief, denies each and every allegation in said libel of information contained, and the whole thereof, and particularly denies that at the time of the seizure of said automobile the same was being used for the removal, concealment or deposit of a commodity on which a tax had been imposed, for the purpose of defrauding the government of said tax.

Further answering said libel of information, and as an affirmative defense thereto, claimant alleges as follows:

I.

That it is the owner of said Jewett sedan automobile described in said libel, under and by virtue of a certain conditional sales contract, a copy of which contract is set out in the claim which this claimant herewith files in this court, and to which claim reference is hereby made. Claimant fur-

ther states that all and singular the matters and things contained in said claim are true.

WHEREFORE claimant prays that said libel be dismissed, that said car be delivered to claimant, and that claimant have its costs and disbursements herein incurred.

GRINSTEAD, LAUBE & LAUGHLIN and
THOMAS E. DAVIS,
Attorneys for Claimant. [5]

State of Washington,
County of Snohomish,—ss.

Margaret J. Farrell, being first duly sworn, on oath deposes and says:

That she is the secretary of Port Gardner Investment Company, a corporation, the claimant named in the foregoing answer; that she has read said answer, knows the contents thereof and believes the same to be true.

MARGARET J. FARRELL.

Subscribed and sworn to before me this 31st day of October, 1924.

[Seal] OLIVER ANDERSON,
Notary Public in and for the State of Washington,
Residing at Everett, Washington.

Copy received Nov. 4, 1924.

J. W. HOAR.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 4, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

CLAIM OF PORT GARDNER INVESTMENT COMPANY, A CORPORATION.

To the Honorable Judges of the United States District Court, for the Western District of Washington, Northern Division:

Comes now Port Gardner Investment Company, a corporation, intervening for its interest in one Jewett Sedan Automobile, License Number 178080, Engine Number 44079, and tools and accessories, one of the libelees above named, and makes claim to said automobile and said tools and accessories, as the same is attached by the United States marshal under a process of the above-entitled court issued at the instance of the libellant above named; and said claimant alleges and avers as follows:

I.

That said claimant is now, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the state of Washington with its principal place of business in Everett in said state, and authorized to do and doing business as a finance and discount corporation dealing largely in the business of discounting automobile paper.

II.

That on the 15th day of March, 1924, W. S. Guy, doing business as W. S. Guy Motor Sales, was the owner of, and in possession of, the above-described automobile and tools and accessories, and

on said 15th day of March, 1924, said W. S. Guy, doing business as W. S. Guy Motor Sales, delivered said automobile and tools and accessories to one Luther L. Neadeau under a conditional sales contract, retaining title in said vendee until said automobile should be paid for; that a true [7] and correct copy of said conditional sales contract is hereto attached, marked Exhibit "A" and made a part hereof; that after delivery of said automobile and tools and accessories to said Luther L. Neadeau, said W. S. Guy, doing business as W. S. Guy Motor Sales, for value received, assigned, transferred and set over to this claimant all of his right, title and interest in and to said conditional sales contract, and sold, assigned and transferred to said claimant said automobile and tools and accessories; that a true and correct copy of said assignment is endorsed on the back of said conditional sales contract, hereto attached, marked Exhibit "A," and made a part hereof; that said conditional sales contract was by this claimant duly filed for record in the office of the county auditor of Snohomish County, Washington, on the 25th day of March, 1924, under auditor's file number 332282.

III.

That the total purchase price of said automobile to be paid by said Luther L. Neadeau was the sum of $1650.00 exclusive of interest and insurance, of which amount $650.00 was paid in cash, and the remainder, including interest and insurance, of

$1134.40, was to be paid in ten monthly payments of $113.44 each beginning on the 29th day of April, 1924.

IV.

That thereafter said Luther L. Neadeau made three payments as follows:

June 4, 1924, $113.44,
June 17, 1924, 113.44 and
August 1, 1924, 113.44

leaving a balance unpaid of $794.08. That no payments have been made since August 1, 1924, and said vendee is in default, and, as claimant is informed and believes, said vendee is insolvent and unless said car is returned to the claimant herein, said claimant will lose the remainder unpaid. [8]

V.

That neither said W. S. Guy Motor Sales nor this claimant had any knowledge that said automobile was to be used, or was used, in any manner in violation of the laws of the United States or of any state.

VI.

Claimant further states that if said car be returned to it, it is willing and hereby offers to pay into the registry of this court, for the use and benefit of the United States of America, any sum which it may be adjudged said car is worth over and above the amount of the monetary value of claimant's interest in said car; or, in the event said car shall be sold, claimant hereby makes claim, out of the proceeds of said sale, for the amount still

due it on said conditional sales contract hereinbefore mentioned.

WHEREFORE claimant prays to be admitted to defend the libel in the above-entitled cause and that said automobile may be surrendered to it, or that it may have a claim upon the proceeds of any sale thereof in the amount found by the court to be due it under said conditional sales contract.

GRINSTEAD, LAUBE & LAUGHLIN and
THOMAS E. DAVIS,
Attorneys for Claimant. [9]

State of Washington,
County of Snohomish,—ss.

Margaret J. Farrell, being first duly sworn, on oath deposes and says:

That she is the secretary of Port Gardner Investment Company, a corporation, the claimant named in the foregoing Claim of Port Gardner Investment Company, a corporation; that she has read the said claim, knows the contents thereof and believes the same to be true.

MARGARET J. FARRELL.

Subscribed and sworn to before me this 31st day of October, 1924.

[Seal] OLIVER ANDERSON,
Notary Public in and for the State of Washington,
Residing at Everett, Wash.

Copy received Nov. 4, 1924.

J. W. HOAR,
Spec. Asst. U. S. Atty. [10]

EXHIBIT "A."

No. ————————

$1134.40 ————

CONDITIONAL SALE CONTRACT.

W. S. GUY MOTOR SALES.

Everett, Wash. March 15, 1924. 19——

FOR VALUE RECEIVED, I, the undersigned (hereinafter designated as the vendee), residing in Monroe, No. R. F. D. #1 Street, County of Snohomish, State of Washington, promise to pay to the order of W. S. Buy Motor Sales, the purchase price of Sixteen Hundred and Fifty and No/100 Dollars, interest and insurance added, of which price the sum of Six Hundred Sixty and No/100 dollars is paid in cash, and the balance I agree to pay, together with 8% interest on unpaid balances each month at the following rate ———. Ten payments of $113.44. First payment due April 29th and on the 29th of each and every month until fully paid. Payments include interest and insurance.

The consideration of the above and foregoing contract is the agreement of the said Vendor to sell and deliver to the undersigned Vendee, one Jewett Special, Style 5 pass. Sedan, Car No. 44037, Motor No. 44079 the delivery and receipt of which is hereby acknowledged, upon the conditions hereinbefore and hereinafter set forth, to wit: It is expressly agreed that the title and right of possession in and to the said property shall

remain in said Vendor, its successors or assigns, until the above specified payments, with interest, have been fully made, then the title thereto shall vest in the undersigned Vendee. It is agreed that said property shall not be sold or removed from Snohomish County without the written consent of the said Vendor, its successors or assigns. Vendee agrees to pay all taxes and assessments on said Jewett Automobile before the same become delinquent. It is further agreed that in case of default in the payment of the said principal sum or any of the installments above mentioned as the same shall fall due according to the terms and conditions hereof, or the undersigned Vendee shall sell or encumber, or attempt to sell or encumber, or remove said property from the place above mentioned, without the written consent of Vendor, its successors or assigns, or shall fail to pay taxes or assessments before the same become delinquent, or if any writ issued by any court or by any Justice of the Peace or any distress warrant shall be levied on said property, or if said Vendor, its successors or assigns, shall at any time deem themselves insecure; or in case of any of the conditions of this contract are not strictly complied with by the undersigned Vendee, the said Vendor, its successors or assigns, shall have the right and option to either: [10-A]

FIRST: Terminate this contract, and may enter any premises with or without force of law, wherever the property is, or is supposed to be, and reclaim the same, the possession of these presents

being sufficient authority therefor; and in case the said Vendor, its successors or assigns, shall retake possession of said property, as aforesaid, all moneys paid on purchase thereof shall be retained as liquidated damages for the non-fulfillment of this contract, without relief from valuation or appraisement laws;

SECOND: Said Vendor, its successors or assigns, may declare the whole amount thereof remaining unpaid, due and payable, and enter any premises, with or without force of law, wherever said property is, or is supposed to be, and take possession thereof, the possession of these presents being sufficient authority therefor, and sell said property at public or private sale, with or without notice to any parties interested (and the Vendor, its successors or assigns, may become a purchaser at said sale) and apply the proceeds of said sale upon the whole amount due, together with interest, costs and attorney's fees, as hereinafter provided; and should the proceeds of such sale be insufficient to pay the amount so remaining unpaid as aforesaid, together with interest, costs and attorney's fees and expenses of such sale, the undersigned Vendee agrees to pay the said Vendor, its successors or assigns, the balance so remaining unpaid;

THIRD: The said Vendor, its successors or assigns, may declare the whole amount thereof remaining unpaid due and payable and may commence an action in any court of competent jurisdiction, against the undersigned Vendee, or any

parties interested herein, and all sureties or endorsers hereon, for the amount due under this contract, together with interest, costs and attorney's fees, and have its lien under this contract foreclosed, and the said property sold in the same manner as personal property is sold under mortgage foreclosure, and the proceeds of such sale applied towards the payment of the principal, interest, costs and attorney's fees, and if the proceeds of such sale are not sufficient to pay the full amount of the principal, interest, costs, and attorney's fees, then the said Vendor, its successors or assigns, shall have deficiency judgment for any balance remaining unpaid and that execution may be issued therefor. It is also agreed that in case the undersigned Vendee fails to carry out the terms and conditions of this contract and make the payments as required herein, and in case the said Vendor, its successors or assigns, is required to retake said property or take and sell the same or commence suit or action as herein provided, the undersigned Vendee agrees to pay, in addition to the costs and disbursements provided by statute, such additional sum as may be adjudged reasonable, as attorney's fees and expenses of sale and collection. For valuable consideration each and every party signing or endorsing this instrument, and the installment notes aforesaid, hereby waives presentment, demand, protest and notice of non-payment thereof and binds himself thereon as principal. It is further agreed that the undersigned Vendee shall keep said property insured while this contract is

No. ——. Conditional Contract Between W. S. Guy Motor Sales and ——. Dated —— 19——.

Date.	Paid on purchase price.	Int.	Received by
June 4, '24	$113.44		M. J. F.
June 17, '24	$113.44		M. J. F.
Aug. 1, '24	$113.44		M. J. F.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 4, 1924. F. M. Harshberger. Clerk. By S. E. Leitch, Deputy. [10-C]

CLAIMANT'S REQUESTED INSTRUCTIONS.

Comes now the above-named claimant, Port Gardner Investment Company, a corporation, and requests the Court to instruct the jury in the above-entitled cause as follows:

GRINSTEAD, LAUBE & LAUGHLIN and
THOMAS E. DAVIS,

Attorneys for Claimant. [11]

I.

Members of the jury, you are instructed to find in favor of the claimant and against the libelant. [12]

II.

You are instructed that under the laws of the United States an automobile cannot be confiscated because intoxicating liquor is found in the automobile. [13]

III.

You are instructed that the so-called tax imposed on intoxicating liquors by the Revenue Laws and Tariff Laws of the United States are penalties and not taxes in the sense that the word "taxes" is used in Section 3450 of the United States Revised Statutes and that before a tax, so called, or penalty, shall be assessed against or collected from any person on account of responsibility for the manufacture or sale of intoxicating liquor, the evidence must first be produced of the illegal manufacture or sale of such intoxicating liquor under hearing had upon the question of such illegal manufacture or sale. [14]

IV.

You are instructed that in this case there is no evidence that there was any hearing had or evidence given of the illegal manufacture or sale of any intoxicating liquor in controversy in this case prior to the time the automobile in question was seized by the Government. [15]

V.

You are instructed in the absence of a hearing and evidence prior to the time of the seizure of the car to determine that the person manufacturing, selling or trafficking in intoxicating liquor found in the car should have a tax assessed against him, said car was not subject to forfeiture. [16]

VI.

You are instructed that in no event can a tax imposed on intoxicating liquor be enforced by forfeiture of an automobile in which the intoxicating liquor was found, but that if such tax is collectible from any-

one, it is collectible only from the person who manufactured, sold or trafficked in such intoxicating liquor. [17]

VII.

You are instructed that the libel in this case charges that the car was being used at the time of the seizure for the removal, concealment and deposit of a commodity, to wit, moonshine whiskey, on which a tax has been imposed, with intent to defraud the Government of such tax. Unless you find that the intent of the driver of the automobile in having the intoxicating liquor in his possession was to defraud the Government of a tax imposed on such liquor, your verdict should be for the claimant. [18]

VIII.

You are instructed that the words "removal, deposit or concealment" as used in the information mean removal, deposit or concealment from a place where the commodity is required by law to be kept so that the Government may there inspect it and collect the tax thereon, such as a distillery, a bonded warehouse, or other place where intoxicating liquor is required by law to be kept until the tax thereon has been paid. [19]

IX.

You are instructed that the burden is upon the United States Government to show that the intoxicating liquor was being removed, deposited or concealed with the intent to defraud the Government of a valid tax imposed upon the same before the automobile in question is subject to forfeiture and that the mere finding of intoxicating liquor in the

car or the transportation of intoxicating liquor in the car, on which intoxicating liquor no tax has been paid, is not sufficient to justify forfeiture of the automobile. [20]

X.

You are instructed that under the laws in force in the United States at the time the car in question was seized, it was unlawful for any person to manufacture or have in his possession intoxicating liquor and that there was no place at which any person manufacturing, selling or trafficking in intoxicating liquor could pay a tax on the same and there was no place where such liquor was required by law to be kept for the purpose of enabling the Internal Revenue Officers to inspect the same, collect taxes thereon and see that Internal Revenue stamps were placed thereon. [21]

XI.

You are instructed that, in this case, the driver of the car at the time it was seized has been charged under the National Prohibition Act with the crime of transporting intoxicating liquor, that he has pleaded guilty to said charge and has been sentenced by this Court and that such action by the United States Government constitutes an election to proceed under the National Prohibition Act and said United States Government cannot now forfeit the automobile in question under the Internal Revenue Laws, to wit, under Section 3450 United States Revised Statutes. [22]

XII.

You are instructed that the burden is upon the

United States Government to prove every material allegation of the charge as stated in the libel or information in this case and that, in addition to proving that intoxicating liquor was in the car at the time it was seized, said United States Government must prove that the same was being concealed or deposited therein with intent to defraud the Government of a tax imposed thereon. [23]

XII½.

You are instructed that there is no presumption that the liquor found in the car at the time it was seized was being removed, deposited or concealed therein with intent to defraud the Government of any tax. [24]

XIII.

You are further instructed that the word "removal" is not synonymous with transportation and that the word removal means only removal from a place where the liquor is required by law to be kept for the purpose of enabling the United States Government to collect the tax thereon and that there is no evidence in this case that said liquor was being removed from such place at the time the car in question was seized. [25]

XIV.

You are instructed that the search-warrant issued to the United States Prohibition Agents was issued in aid of the enforcement of the United States Prohibition Act and not for the purpose of enabling the officers who seized the automobile in question to collect taxes imposed under the Internal Revenue Act and that seizures made under such search-warrant

cannot be the basis of an action to forfeit an automobile under the Internal Revenue Laws. [26]

XV.

You are instructed that under the National Prohibition Act the rights of innocent lienors or vendors who hold valid chattel mortgages or conditional sales contracts on an automobile used for the transportation of intoxicating liquor are protected. That the claimant in this case holds a valid conditional sale contract on the automobile in question. That there is a balance due said claimant of the sum of $794.08. [27]

XVI.

You are instructed that the Internal Revenue Act, to wit, Section 3450, under which the United States Government is proceeding in this case, has been repealed by the National Prohibition Act in so far as it provides for the forfeiture of vehicles used for the transportation of or trafficking in intoxicating liquor. [28]

XVII.

You are instructed that the Internal Revenue Act under which the United States Government is proceeding in this case, to wit, Section 3450, United States Revised Statutes, has been repealed by the National Prohibition Act in so far as the same has any application to the rights of the Government to forfeit the automobile in question and that a forfeiture under said Act cannot be had in the present case. [29]

XVIII.

You are instructed that the automobile in question

in this action cannot be forfeited because the same was being used for the removal of intoxicating liquor. [30]

XIX.

You are instructed that unless the automobile involved in this action was, at the time of the seizure of the same, being used for the deposit or concealment of a commodity on which a tax had been imposed with intent to defraud the Government of such tax, said automobile cannot be forfeited and your verdict must be for the claimant. [31]

XX.

You are instructed that the words "deposit or concealment," as used in the information, mean deposit or concealment of an article at a place other than the place where it is required by law to be kept for the purpose of enabling the United States Government to collect the tax thereon, and that unless the automobile in question was at the time being used for such purpose, said automobile cannot be forfeited in this action. [32]

XXI.

You are further instructed that, under the laws of the United States of America, in force at the time the automobile in question was seized, there was no place where the intoxicating liquor claimed by the Government to have been found in this car was required to be kept for the purpose of enabling the United States Government to collect a tax thereon and your verdict must therefore be for the claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Jan. 7, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [33]

CLAIMANT'S REQUESTED ADDITIONAL INSTRUCTIONS.

Comes now the above-named claimant, Port Gardner Investment Company, a corporation, and requests the Court to instruct the jury in the above-entitled cause as follows: [34]

XXII.

You are instructed that, in determining whether the automobile in question was being used for the deposit or concealment of a commodity on which a tax had been imposed with intent to defraud the Government of such tax, you should determine whether the natural and probable consequences of the use to which the car was being put at the time alleged in the information would result in defrauding the Government of a tax imposed upon the article alleged to have been concealed or deposited in the car and that unless you believe from the evidence that the Government would have, in the ordinary course of events, collected a tax on such article if the article had not been deposited or concealed in the automobile, your verdict should be for the claimant and you should find the automobile not guilty. [35]

XXIII.

In the present case, unless the acts done by the driver of the automobile in question resulted in de-

priving the Government of taxes, which, except for the doing of such acts the Government would, in all probability, have collected, the doing of such acts as were done in this case would not be any evidence of an intent to defraud the Government of the tax imposed upon the commodity alleged to have been found in the automobile in question; that is, unless the completion of the acts alleged to have been done would result in depriving the Government of a tax which it otherwise would collect, the mere doing of the acts would not be in evidence of any intent to defraud the Government of such tax. [36]

VERDICT.

We, the jury in the above-entitled cause, find the libelee, One Jewett Sedan Automobile, etc., is guilty as charged in the Information herein.

EDLEF H. AHRENS,
Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 7, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [37]

DECREE.

This cause came on duly and regularly for trial on the sixth day of January, 1925, the libelant appearing by its attorneys Thos. P. Revelle, United States Attorney for the Western District of Wash-

ington, and J. W. Hoar, Assistant United States Attorney for said district; and the Port Gardner Investment Company, a corporation, being represented by Grinstead, Laube & Laughlin, and Thomas E. Davis, its attorneys, and having theretofore filed herein its claim in intervention, asking that it be allowed to establish its claim against said car, to be deducted from the proceeds to be derived from the sale of said automobile, or in the event that said automobile should not be worth more than the amount of its claim, that said automobile be surrendered to said claimant, and claimant having further filed an answer herein to the allegations set forth in the information; and it appearing to the Court that due notice of the seizure of said One Jewett Sedan Automobile, Washington License No. 178080, Engine No. 44079, and tools and accessories, and the time and place of trial and hearing upon the information filed herein, has been given both by publication and posting of the same in accordance with the statutes and laws in such cases made and provided; all of which is shown by the files and records herein, and no other claims having been filed, and all other claimants, if any there be, being in default for failure to appear and defend herein, the case proceeded to trial; the jury having been duly and regularly impaneled and sworn, and evidence having been submitted by the libelant in support of the allegations contained in said information, and witnesses having been cross-examined by the claimant, and evidence having been submitted on behalf of the Port Gardner Investment Company, a corporation, claimant herein,

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 9, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [40]

ORDER EXTENDING TIME FOR PREPARING AND SERVING BILL OF EXCEPTIONS TO AND INCLUDING FEBRUARY 3, 1925.

Pursuant to stipulation of the above-named libelant and the above-named claimant, this day filed herein, and good cause therefor appearing,—

IT IS HEREBY ORDERED that the claimant have until and including the 3d day of February, 1925, in which to prepare and serve its bill of exceptions herein, and the time for preparing and serving said bill of exceptions is hereby extended accordingly.

Done in open court this 9th day of January, 1925.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 9, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [41]

BILL OF EXCEPTIONS.

INDEX.

LIBELANT'S EVIDENCE:
SIMMONS, J. M.
Direct Examination 3
Cross-examination 7
Redirect Examination 13
JOHNSON, JAMES A.
Direct Examination 14
Cross-examination 16
KLINE, C. W.
Direct Examination 16
MILLER, WALLACE C.
Direct Examination 18
Cross-examination 19
WHITNEY, W. M.
Direct Examination 20
Cross-examination 21
WHITNEY, M. W. (Recalled)
Cross-examination 24
LEITCH, S. E.
Direct Examination 28
Cross-examination 31
CLAIMANT'S EVIDENCE:
Stipulation of Facts 32
NEADEAU, L. L.
Direct Examination 35
Cross-examination 41
Court's Instructions 44
Exceptions to Instructions................. 54

EXHIBITS:

Libelant's Exhibit 1, Bottle and Contents...... 21
Claimant's Exhibit "A," Search-warrant..... 12
Claimant's Exhibit "B," Certified Copy of Bill of Sale 35

[42—1]

BE IT REMEMBERED, that heretofore and on, to wit, January 6, 1925, the above-entitled cause came on regularly for trial in the above-entitled court, and before the Honorable E. E. Cushman, one of the Judges of said Court, sitting with a jury.

The Libelant appearing by Thos. P. Revelle, Esq., United States Attorney, and J. W. Hoar, Esq., Assistant United States Attorney;

The Claimant appearing by Thomas E. Davis, Esq. (of Messrs. Grinstead, Laube & Laughlin), its attorneys and counsel.

And thereupon the following proceedings were had and testimony taken, to wit:

(A jury was duly empaneled to try the cause, and opening statement made by attorney for libelant.) [43—2]

TESTIMONY OF J. M. SIMMONS, FOR LIBELANT.

J. M. SIMMONS, called as a witness on behalf of the libelant, was duly sworn, and testified as follows:

Direct Examination.

(By Mr. HOAR.)

Q. State your full name. A. J. M. Simmons.

(Testimony of J. M. Simmons.)

Q. What is your business, Mr. Simmons?

A. Federal Prohibition Agent.

Q. How long have you been engaged in that business? A. Since June, 1922.

Q. I will ask you if you are acquainted with one L. L. Neadeau? A. I am, yes, sir.

Q. Do you know the premises occupied by him between here and Everett? A. It is near Monroe.

Q. Near Monroe? A. Yes, sir.

Q. Can you tell the jury more closely, that is, more accurately, where these premises are located?

A. It is the second house on the right-hand side as you come out of Monroe, and on the south, or southwest end of the highway bridge over the Skykomish River about two miles or so out of Monroe.

Q. Did you have occasion to visit those premises on the 9th of August, 1922? A. I did, yes, sir.

Q. Who was with you, if anyone?

A. Agent Kline, and Agent Johnson. [44—3]

Q. Just tell the jury in your own words what transpired on the occasion of that visit with relation to any automobile.

A. We were waiting there for the defendant to return, as we had been told by the defendant's wife that he had gone away and was expected to return shortly. It was about eleven o'clock that the defendant drove into the yard through an open gate from the highway on to his premises in a Jewett sedan. I went over to the sedan and saw a 5-gallon keg in the tonneau of this sedan. On opening the door I could distinctly smell the odor of distilled

(Testimony of J. M. Simmons.)

spirits, and more clearly saw the keg of distilled spirits. I placed the defendant under arrest.

Q. At that time did you have a search-warrant for the premises of Mr. Neadeau?

A. I did, yes, sir.

Q. Did you have any conversation with Mr. Neadeau relative to those distilled spirits at that time?

Mr. DAVIS.—Just a minute. Your Honor, Mr. Neadeau is not on trial, and we object to any conversation with Neadeau; that would not be binding on the car that is on trial.

The COURT.—Neadeau was the conditional vendee?

Mr. DAVIS.—Yes, your Honor.

The COURT.—And the claimant is the vendor?

Mr. DAVIS.—Yes, your Honor.

The COURT.—Objection overruled.

A. Mr. Neadeau stated that he owed some money, around $700,—I do not just recall the exact figure, and that he had [45—4] been bootlegging, trying to pay for the car, and that he was not physically able to—

Mr. DAVIS.—Your Honor, we object to this on the ground that Neadeau is not on trial here. Now, their theory of the case is that the car itself is on trial, and Neadeau cannot bind the car by his statements; it is hearsay.

The COURT.—Objection overruled.

A. Due to the fact that he was physically unable to earn money he was trying to earn money by selling moonshine whiskey to pay for this car.

(Testimony of J. M. Simmons.)

Q. Directing your attention to Libelant's Exhibit 1, I will ask you if you know what the contents of that bottle are, or where they came from?

A. That is a sample of the moonshine whiskey taken from the 5-gallon keg.

Q. Which keg?

A. That was seized in the tonneau of the Jewett sedan.

Q. Do you know, Mr. Simmons, what the contents of that bottle is?

A. It is moonshine whiskey.

Q. Did the defendant Neadeau make any statements as to where he got this liquor at that time, do you recall? A. No, he did not.

Q. Do you know whether or not the defendant Neadeau subsequently pleaded guilty to the possession and transportation of this liquor that you seized at that time, in the Federal Court in the Western District of Washington?

Mr. DAVIS.—We object to that on the ground that the records of the court are the best evidence of their [46—5] contents.

The COURT.—Of course the identity of the man is something the witness can testify to, but just what he pleaded guilty to, you are right, so I will sustain the objection.

Mr. DAVIS.—I have asked the clerk to bring in the records in that case.

The COURT.—The records show the date of the plea and the like. You can examine this wit-

ness as to whether he knows that was the same man that—

Mr. DAVIS.—We will admit that he was the same man.

The COURT.—(Continuing.) —that pleaded guilty.

Mr. DAVIS.—We will admit that the man who pleaded guilty here is the man who was driving the car. But if they go into what he pleaded guilty to, we object because the records are here.

The COURT.—Objection sustained.

Mr. HOAR.—I would like to have the clerk read them into the record.

The CLERK.—I have nothing except the file; I have not the judgment and sentence. I have made an examination of the record and I can testify to what it says.

Mr. DAVIS.—The information may be read into the record as far as we are concerned.

Mr. HOAR.—I will ask that it all be brought in at one time, if there is any question about it, the information, the judgment, the plea, and the whole record.

The CLERK.—I can testify what was done from an examination of the docket. [47—6]

Mr. DAVIS.—I ask that Mr. Leitch go and look up the record; I am willing to take his statements as to what the record shows, other than the information.

Mr. HOAR.—Very well. You may take the witness.

(Testimony of J. M. Simmons.)

Cross-examination.

(By Mr. DAVIS.)

Q. You are a Federal prohibition agent?

A. Yes, sir.

Q. The search-warrant under which you were operating at the time this seizure was made was a search-warrant sued out under the National Prohibition Act, was it not? A. It was, yes, sir.

Q. You had no search-warrant to search the premises to obtain evidence of violation of the Internal Revenue Act, did you?

Mr. HOAR.—Objected to as immaterial and calling for a conclusion of the witness.

The COURT.—Objection sustained.

Q. The warrant which was issued did not charge any violation of the Internal Revenue Act, did it?

A. No.

Mr. HOAR.—I think the warrant would speak for itself.

The COURT.—The question has been answered.

Q. The container of this liquor, you say, was a keg? A. It was, yes, sir.

Q. A 5-gallon keg?

A. A 5-gallon wooden keg, yes, sir.

Q. Was that keg clearly visible when the car drove up? [48—7] A. Not entirely, no, sir.

Q. Could you tell without opening the car that the keg was inside of the car?

A. After I got up to the car where I could look in through the glass, yes, sir, I could see the keg.

(Testimony of J. M. Simmons.)

Q. That is what I mean. A. Yes, sir.

Q. The keg was not concealed in the car in the sense that you could not see it in there without opening the car, was it? A. Oh, no.

Q. There was no hiding of it in the bottom of the car, or covering it up with blankets, or anything like that?

A. A man would have to be unusually tall or either stand on the running-board in order to see it. You could not see it from the—

Q. (Interrupting.) But another person driving along in an automobile, meeting that one, and looking through the glass, would be up plenty high enough to see the keg? A. Yes.

Q. So there was no concealment of the keg in the car in the sense that it could not be seen without opening the car, was there? A. No.

Q. The position of that keg of liquor in the car would not make it any more difficult for an internal revenue officer or prohibition agent to see it there for the purpose of collecting taxes on it, than if it were sitting on a stump or on the ground around there?

Mr. HOAR.—Objected to as argumentative. [49—8]

The COURT.—Objection overruled.

A. Well, I do not know as it is material where it was; it was in the car.

Q. That is what I say.

A. For that reason I seized the car.

Q. The fact it was in the car would not pre-

(Testimony of J. M. Simmons.)

vent officers from seeing it or collecting taxes on it any more than if it had been sitting in the brush, on the ground, or on a stump around there in the same vicinity?

Mr. HOAR.—Objected to as immaterial.

The COURT.—Well, as I understand this question, it is whether it was any more concealed in the car than it would be out in the middle of the road or on the ground?

Mr. DAVIS.—Yes, your Honor.

The COURT.—Objection overruled.

A. It would be more concealed in the car, yes, sir.

Q. A little bit more. That is, if a man were down low, he could not see it, but a tall man standing up, or a man in another automobile, passing it, or up on the level with the glass of the car, could see it just as easily there as he could—

A. (Interrupting.) Oh, no, no.

Q. You said a minute ago, I understood, that you could clearly see it in the car.

A. Providing that—

Q. (Interrupting.) Providing that you were looking at it.

A. And that the car was standing still.

Q. And looking in that direction.

A. And you were looking for such a thing. [50—9]

Q. It was about as visible as a person sitting in the car would be, wouldn't it?

A. Well, no, I wouldn't say that.

(Testimony of J. M. Simmons.)

Q. There were no side curtains or blinds drawn over the glass panels of the car, were there?

A. No.

Q. It was clearly open in that sense.

A. But on the floor of the car.

Q. But the car was open?

A. That is high up. The bottom part of the sedan was metal or wood, or whatever it was constructed of.

Q. Would you say that the liquor in this car was plainly visible? Was it setting upright in the back of the car plainly visible to yourself and the agents who were with you before any arrest was made? A. Yes, sir.

Q. And before you opened the door of the car?

A. Yes, sir.

Q. You have filed an affidavit in the case of United States vs. Luther L. Neadeau, and to which you attached a copy of the search-warrant which was issued in this case. I wonder if you have available an extra copy of that search-warrant?

Mr. HOAR.—The original is in the record.

Mr. DAVIS.—In which record?

Mr. HOAR.—In the file.

Mr. DAVIS.—It is not in this file of United States vs. Neadeau.

Mr. HOAR.—It is in the Commissioner's transcript.

Mr. DAVIS.—Oh, it is? [51—10]

Mr. HOAR.—It should be.

(Testimony of J. M. Simmons.)

Mr. DAVIS.—It is attached to his affidavit and it says it is a correct copy. Is there any question about it?

Mr. HOAR.—Not that I know of. As far as I know it is a correct copy. The original is with the Commissioner's transcript.

Mr. DAVIS.—Where would that be found?

Mr. HOAR.—In the office.

Q. The search-warrant under which you made this arrest and seizure was a search-warrant describing the defendants as John Doe and Richard Roe Johnson, was it not?

A. I do not just recall the names. I know they were *aliases*, or John Does, because I did not know them.

Q. That is your affidavit, isn't it? (Handing witness document.)

The COURT.—We do not care which particular member of the Doe family it was.

Mr. DAVIS.—The only thing I wanted to do was to identify the search-warrant.

Q. Now, that is a correct copy of the search-warrant, isn't it? You have stated in this affidavit that it is.

A. As far as I know. That is a copy of the records as they are in the United States Attorney's office; that is the search-warrant.

Mr. DAVIS.—I would like to have this copy of the search-warrant introduced in evidence.

Mr. HOAR.—I think the original ought to go in,

(Testimony of J. M. Simmons.)

if anything. I do not know whether that is an exact copy or not. [52—11]

The COURT.—The case looks like it will run over to-morrow, and you can compare that with the original.

Mr. HOAR.—I have no objection if it is a correct copy.

Mr. DAVIS.—If it is not a correct copy, I will ask to have it made a correct copy.

The COURT.—You may compare that at five o'clock and raise your objection in the morning. Is that satisfactory?

Mr. HOAR.—Yes. I have no doubt but what that is a correct copy, but I do not know.

The COURT.—It will be admitted then.

(Document above referred to admitted in evidence as Claimant's Exhibit "A.")

Q. Were you present when this sample was taken out of the keg? A. Yes, sir.

Q. Did you take it out yourself?

A. Mr. Kline did.

Q. Did you drill a hole through the keg, or how did you open the keg?

A. No, there is a cork in it.

Q. There was a cork in it? A. Yes.

Q. Was the keg full? A. Yes.

Q. Approximately full?

A. Approximately full.

Q. Do you know what became of that keg?

A. I could not say. [53—12]

Q. This is all that has been saved of it?

(Testimony of J. M. Simmons.)

A. Yes, sir.

Q. The rest has been destroyed?

A. That was destroyed after the completion of the Neadeau case.

Q. Where is Mr. Neadeau's residence out there? Is it in town, or on a farm, or out in the country, in the woods, or where is it?

A. It is out in the country.

Q. A little farm out there; a small tract of about ten acres?

A. Yes, sir. It is not his; I understand it is his mother's.

Q. His mother's home?

A. That is what I understand.

Q. His wife was there that day. Was his mother there?

A. No. There was a brother-in-law, a sister-in-law, or some relations there; a young couple.

Q. You did not know Mr. Neadeau's name prior to the time you went out there?

A. I did not know it, no, sir.

Mr. DAVIS.—I think that is all.

Redirect Examination.

(By Mr. HOAR.)

Q. If I understand, Mr. Simmons, you could not see this keg until you got up close to the car, and you could look through the glass?

A. That is when I saw it.

Mr. HOAR.—That is all.

(Witness excused.) [54—13]

TESTIMONY OF JAMES A. JOHNSON, FOR LIBELANT.

JAMES A. JOHNSON, called as a witness on behalf of libelant, was duly sworn and testified as follows:

Direct Examination.

(By Mr. HOAR.)

Q. State your full name.

A. James A. Johnson.

Q. What is your business, Mr. Johnson?

A. Federal prohibition agent.

Q. How long have you been engaged in that occupation? A. Two years *last* last September.

Q. Are you acquainted with Luther L. Neadeau?

A. Well, I could not say that I am acquainted with him. I was present when he was arrested?

Q. You were present at the premises near the city of Monroe?

A. Just this side of the bridge.

Q. At the time Mr. Simmons has testified to?

A. Yes, sir.

Q. Did you see any distilled spirits, of any kind in this car at that time?

A. I was searching the premises back in the house, and we had been there something over an hour. I came around to the front, and I saw this sedan sitting down in front of the house. I asked the boys what they had, and they said they had brought in this car with a keg of whiskey. It was about forty feet,—thirty or forty feet from the

(Testimony of James A. Johnson.)
front of the house, and I walked down to the car, and the door was standing open, and this 5-gallon keg of whiskey was sitting in a gunny-sack in the bottom of the car. [55—14] I opened up the top of it,—took the cork out of the bung-hole and stuck my finger down it and tasted it to see what it was. I usually taste whiskey when we seize it, and it was moonshine whiskey. The keg was approximately full.

Q. Fit for beverage purposes, was it?

A. It was such as they use.

Q. It was fit for beverage purposes within the contemplation of the law, as you understand the law?

A. Yes, as I understand the law.

Q. Did you have any conversation with Mr. Neadeau relative to this?

A. No. I drove down in another machine. I offered to drive the machine to Everett. He said he wanted to go to Everett. I heard him make the statement that he had purchased it in Everett, and there was something due on it, some considerable sum of money was due. There was a question of who was going to drive it, and I offered to drive it, and he objected to me driving it. He said he would drive it himself, and he drove it to Everett. I think I drove in with another man in a car that we had hired.

Q. Referring to Libelant's Exhibit 1, for identification, do you know anything about the contents of that? A. Mr. Kline told me this was—

(Testimony of James A. Johnson.)

Q. (Interrupting.) Were you present—

Mr. DAVIS.—Just a minute.

A. Not when it was taken out, no.

Mr. HOAR.—I will withdraw the question. Take the witness. [56—15]

Cross-examination.

(By Mr. DAVIS.)

Q. When you came to the car, the door was open?

A. The door was standing ajar, yes, sir.

Mr. DAVIS.—I think that is all.

(Witness excused.)

TESTIMONY OF C. W. KLINE, FOR LIBELANT.

C. W. KLINE, called as a witness on behalf of libelant, was duly sworn and testified as follows:

Direct Examination.

(By Mr. HOAR.)

Q. State your name, please?

A. C. W. Kline.

Q. What is your business, Mr. Kline?

A. Federal prohibition agent.

Q. As such what are your duties?

A. To take charge of all the liquor seized by the Government and maintain it until they come into court, and analyze it for alcoholic content.

Q. Mr. Kline, directing your attention to Libelant's Exhibit 1, for identification, I will ask you

(Testimony of C. W. Kline.)

to examine that and state whether or not you have seen the contents of that bottle before?

A. I have. I put the contents in it out of the 5-gallon keg that we seized, drew this quart out to see what it was. It was 100 proof, 50 alcohol, fit for beverage purposes.

Q. You analyzed the contents of it? [57—16]

A. Yes, sir.

Q. Were you present at the time that liquor was found? A. I was.

Q. Did you see the container of that liquor in the automobile at the time?

A. I saw the automobile come up with it, and I went over and examined it and found the 5-gallon keg in a sack in the machine, and then helped to take it out.

Q. Did you have any conversation with Mr. Neadeau at that time with relation to this liquor, do you recall?

A. He only made the remark to me that when he seen me he knew it was all off; he knew it was all off as soon as he had seen me.

Q. Did he know you before?

A. He had seen me before, yes.

Mr. HOAR.—You may take the witness.

Mr. DAVIS.—I have no questions.

(Witness excused.) [58—17]

TESTIMONY OF WALLACE C. MILLER, FOR LIBELANT.

WALLACE C. MILLER, called as a witness on behalf of libelant, was duly sworn and testified as follows:

Direct Examination.

(By Mr. HOAR.)

Q. State your full name?

A. Wallace C. Miller.

Q. What is your business, Mr. Miller?

A. Assistant cashier of customs.

Q. As such what are your duties?

A. I have charge of the accounts, of the collections.

Q. Of what, Mr. Miller?

A. Collections of all kinds that the customs have.

Q. If customs taxes or internal revenue taxes are paid upon imported liquors, distilled spirits, do they come through your office?

A. Yes, sir.

Mr. DAVIS.—Now, your Honor, we object to that on the ground that there is no evidence this liquor was imported.

The COURT.—Objection overruled.

Q. If they were paid, would you by virtue of your office, know of their having been paid?

A. Yes, sir.

Q. I will ask you if your books show that one Luther L. Neadeau has paid any customs tax, or

(Testimony of Wallace C. Miller.)

internal revenue tax to your office within the last three years? A. No, sir.

Q. Have any taxes been paid by anybody on intoxicating liquor in your office within the last three years? [59—18]

A. No, sir.

Mr. HOAR.—You may take the witness.

Cross-examination.

(By Mr. DAVIS.)

Q. Do you take care of the collection of internal revenue taxes as well as customs?

A. On imported liquors, yes, we would.

Q. Only on imported liquors? A. Yes.

Q. Not on liquors manufactured in this country?

A. No, sir.

Q. You would have no way from your records of telling even if it were imported liquors, and had been imported through any other port than one in the State of Washington, whether such customs had been paid or not? A. No, sir.

Mr. DAVIS.—That is all.

(Witness excused.) [60—19]

TESTIMONY OF W. M. WHITNEY, FOR LIBELANT.

W. M. WHITNEY, called as a witness on behalf of libelant, was duly sworn and testified as follows:

Direct Examination.

(By Mr. HOAR.)

Q. State your full name.

(Testimony of W. M. Whitney.)

A. W. M. Whitney.

Q. What is your business, Mr. Whitney?

A. I am a Federal prohibition officer, and deputy collector of revenue for the State of Washington under Burns Poe.

Q. Mr. Whitney, I will ask you if you have examined the books of Burns Poe with relation to the payment of internal revenue taxes upon domestic liquors? A. Yes, sir.

Q. Do you know whether or not one Luther L. Neadeau has paid any taxes in Tacoma within the past three years? A. I know he has not.

Q. Has anybody paid any taxes within that time?

A. No, sir, none have. That is, on liquors produced in the State of Washington, distilled spirits.

Q. I will ask you if you are familiar with this particular case of Mr. Neadeau?

A. I saw the keg of moonshine which was brought to the office. I am familiar with this (indicating) bottle of moonshine.

Q. Directing your attention to Libelant's Exhibit 1 for identification, I will ask you if you have personally sampled the contents of this bottle?

A. Yes.

Q. Do you know what it is? [61—20]

A. Moonshine or illicit whiskey, as we call it, moonshine as distinguished from bonded liquor.

Q. Is it fit for beverage purposes?

A. Yes, sir.

(Testimony of W. M. Whitney.)

Mr. HOAR.—At this time we offer Libelant's Exhibit 1.

The COURT.—It will be admitted.

(Bottle with contents above referred to admitted in evidence as Libelant's Exhibit 1.)

Mr. HOAR.—That is all.

Cross-examination.

(By Mr. DAVIS.)

Q. You say you are a deputy collector of revenue?

A. Yes, sir.

Q. Of internal revenue? A. Yes, sir.

Q. Have you ever collected any revenue taxes?

A. I have not.

Q. How extensive is Burns Poe's books as to territory; what territory does his office cover?

A. I know it covers the State of Washington.

Q. If the liquor in question here had a tax paid on it outside of Burns Poe's district, his record would not show anything about that? A. No.

Q. Where in the State of Washington is it possible for a man to pay a tax on intoxicating liquors such as this?

A. It is not possible now without a permit from the Commissioner of Internal Revenue. [62—21]

Q. It is not possible to pay the tax?

A. It is not legal to manufacture without a permit from the Collector,—Commissioner of Internal Revenue.

Q. Then, he would not give you a permit to manufacture that kind of stuff, would he?

(Testimony of W. M. Whitney.)

A. It would be within his province under the law if he deemed that it was,—if the liquor in bonded distilleries had reached a point where it was necessary.

Q. Where it was necessary? A. Yes.

Q. Has anyone in the State of Washington, to your knowledge, a permit to manufacture liquor?

A. Not distilled spirits, they have no permits; it is a bone dry state.

Q. So at present there would be no way which a man in the State of Washington could pay a tax on such stuff, even if he wished to?

A. Not without a permit, and as this is a bone dry state a permit would not be issued him.

Q. In the State of Washington? A. Yes.

Q. That is, the Federal authorities—

A. (Interrupting.) For beverage purposes.

Q. The Federal authorities would not permit anyone to manufacture liquor in this state where it conflicts with the state law?

A. They probably would not give such a permit. But permits are not granted anywhere because the quantity of liquor already in the bonded warehouses—

Q. (Interrupting.) So that so far as revenue purposes are [63—22] concerned, there is no way by which the Government can profit from the manufacture of such liquor as that in question in the State of Washington, or from the traffic of it in the State of Washington, is there, by levying or collecting a tax on it?

(Testimony of W. M. Whitney.)

A. Well, not at this particular time.

Q. And at the time this liquor was seized the situation was the same as it is now?

A. Yes, sir, there were no permits in this state at that time.

Q. You were not present at the time this seizure was made, Mr. Whitney? A. No.

Mr. DAVIS.—I think that is all.

Mr. HOAR.—That is all.

(Witness excused.)

Mr. HOAR.—Have you those records, Mr. Leitch?

Mr. LEITCH.—In the Neadeau case?

Mr. HOAR.—Yes.

Mr. DAVIS.—There was just one more question I wanted to ask Mr. Whitney.

The COURT.—Very well. [64—23]

W. M. WHITNEY resumed the stand.

Cross-examination.

(By Mr. DAVIS.)

Mr. Whitney, the testimony of the United States officers up to the present time indicate that the liquor of which Exhibit 1 is a sample, was found in a 5-gallon keg in the rear of the automobile in question up near Monroe, Washington, on the 9th day of August, 1924? Will you tell the jury whether the fact that that liquor was in the car at the particular time in any way deprived the Government of any tax which it could have collected, or would have collected if the liquor had been anywhere else in

(Testimony of W. M. Whitney.)

the State of Washington at the time this seizure was made.

Mr. HOAR.—Objected to, if the Court please, as calling for a conclusion of the witness.

Mr. DAVIS.—This gentleman was called as an expert first on the internal revenue tax and customs tax.

The COURT.—Read the question.

(Question read.)

The COURT.—Objection sustained.

Mr. DAVIS.—That is the whole theory of the case, that by reason of its being in there there was an intent to deprive the Government of the tax.

The COURT.—The question you are asking is whether the verdict should be "guilty" or "not guilty."

Mr. DAVIS.—That probably is a conclusion for the jury to arrive at.

The COURT.—Objection sustained. [65—24]

Mr. DAVIS.—I would like to have an exception.

The COURT.—Exception allowed.

Q. If your office found intoxicating liquor any place in the State of Washington and in anyone's possession, would you be able to collect any taxes on that liquor for the Government?

A. We assess them, yes, sir.

Q. Have you ever done that?

A. If it is distilled spirits, oh, yes; if it is distilled spirits or beer or wine.

Q. You would have the power to assess a tax?

A. When we write our report to Washington, we

(Testimony of W. M. Whitney.)

always write in so much assessments, and later on a hearing is held before the Commissioner of Internal Revenue in Tacoma and an assessment is made. But generally, if they have no property we wipe off the assessment; if they have property and we think we can collect the assessment, we proceed.

Q. You levy an assessment?

A. We do not have power to levy it, but the Commissioner of Internal Revenue does after this hearing. Usually there is a compromise settlement.

Q. In other words, when you find a man manufacturing distilled spirits, or engaged in the business of selling distilled spirits, you operate under that section of the statute which provides for a levy of an assessment, or a levy of a tax, whichever you want to call it, against the man, do you not?

A. Your question was not with reference to section 3450. I was answering the question under the Internal— [66—25]

Mr. HOAR.—I would like to object to that question. It seems to me we are getting off into ramifications—

The COURT.—Objection sustained.

Mr. DAVIS.—I want to see whether there is any machinery—

The COURT.—It is all a matter of law.

Mr. DAVIS.—It may be a matter of law, your Honor, in a way, but when it comes to a question of an intent to deprive the Government of some-

thing which the Government could not possibly get, no matter what the man did, I think it becomes material as to whether there is any machinery, or if there is any machinery to so operate. Now, as I understand the law when a man is found manufacturing or selling distilled spirits, the Government officers have the authority to start a proceeding in which notice is issued and a hearing had to levy a penalty, which the Supreme Court of the United States calls a penalty, and not a tax, against the man, not against the particular distilled spirits, and then they can levy execution, after notice and hearing, on any property which the man has and proceed to collect the tax. That is the only way in which a tax can be collected.

The COURT.—I do not think these are questions for the jury to be puzzled with.

Mr. DAVIS.—Possibly they are not, your Honor, but in order to arrive at what his intent was,—attempt to deprive the Government of a tax, as they call it, I think it becomes material to show whether the Government has any machinery, and if so, what this machinery is. [67—26]

The COURT.—I do not see its relevancy. Objection sustained.

Mr. DAVIS.—Exception, please.

The COURT.—Allowed.

Mr. DAVIS.—I think that is all.

(Witness excused.)

Mr. HOAR.—The Government rests. Just one other question. This record here, where is it?

(Testimony of S. E. Leitch.)

Mr. DAVIS.—That information? I think Mr. Leitch can state to the jury as to what the record shows as to the sentence and the pleas. I do want the information to be put in evidence, or read into the record; I do not care which.

The COURT.—Do you want Mr. Leitch sworn?

Mr. HOAR.—Yes, I would like to have Mr. Leitch sworn. [68—27]

TESTIMONY OF S. E. LEITCH, FOR LIBELANT.

S. E. LEITCH, called as a witness on behalf of libelant, was duly sworn, and testified as follows:

Direct Examination.

(By Mr. HOAR.)

Q. State your name, please. A. S. E. Leitch.

Q. Will you read the information filed in this case? How many counts were there in that information? A. There were three counts.

Q. There are only two counts upon which there was a record of conviction. A. Yes, that is true.

Q. Will you read the two counts involved here?

A. Omitting the title?

Q. Yes, and the number.

No. 8879.

"UNITED STATES OF AMERICA,
Plaintiff,

vs.

L. L. NEADEAU,
Defendant.

INFORMATION.

Be it remembered, that Thomas P. Revelle, attorney of the United States of America for the Western District of Washington, who for the United States, in its behalf, prosecutes in his own person, comes here into the District Court of the said United States for the district aforesaid on this 27th day of September in this same term, and for the United States, gives the court here to understand and be informed that:

COUNT ONE.

That on the 9th day of August in the year of our Lord One Thousand Nine Hundred Twenty-four about three [69—28] miles north of the town of Monroe in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, L. L. Neadeau, whose true Christian name is to the said United States attorney unknown, then and there being or then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit: Five (5) gallons of a certain liquor known

as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume, and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said L. L. Neadeau for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition Act, by selling, bartering, exchanging, giving away and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said L. L. Neadeau, as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the said United States Attorney for the said Western District of Washington, further informs the Court:

COUNT TWO.

That on the 9th day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-four, and [70—29] about three miles north of the town of Monroe in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, L. L. Neadeau, whose *two* Christian name is to the said United States Attorney unknown, then and there being or then and there knowingly, willfully, and unlawfully,

(Testimony of S. E. Leitch.)

transported certain intoxicating liquor, to wit: Five (5) gallons of a certain liquor known as distilled spirits, then and there containing more than one-half of one per centum of alcohol by volume, and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which said transporting by the said L. L. Neadeau, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. Thomas P. Revelle, United States Attorney, J. W. Hoar, Special Assistant United States Attorney."

I was mistaken; there are only two counts in the information.

Q. Did Mr. Neadeau plead in that case?

A. He did.

Q. What does the record show his plea to be?

A. It shows that on December 1st, 1924, he entered a plea of guilty to each count.

Q. That was in the Western District of Washington? A. Yes. [71—30]

Mr. HOAR.—That is all.

Cross-examination.

(By Mr. DAVIS.)

Q. What does the record show as to the sentence given?

(Testimony of S. E. Leitch.)

A. He was fined $100 on Count One, and $150 on Count Two on the date of his plea.

Mr. DAVIS.—I think possibly it can be stipulated between the United States Attorney and myself that the automobile in question in this case which the Government is now seeking to forfeit is the same car that was used in the transportation of the liquor mentioned in the second count of the information which has just been read. That is correct, is it not, Mr. Hoar?

Mr. HOAR.—Yes.

The WITNESS.—I might add this information was filed in the clerk's office on September 27th, 1924.

Mr. DAVIS.—That is all.

Mr. HOAR.—That is all.

(Witness excused.)

Mr. HOAR.—Will you admit the man that pleaded guilty was the same man that was arrested with the car?

Mr. DAVIS.—Yes, we admit that the man who pleaded guilty in that action, or to those charges which have just been read, is the man whom the witnesses have been testifying was driving the car at the time the United States officers found the liquor in question in the back of the car.

Mr. HOAR.—The Government rests. [72—31]

Mr. DAVIS.—We have on file in this case a stipulation as to certain facts. I think Mr. Hoar and I should straighten this stipulation up as there

are certain things that were stipulated here that have since been withdrawn.

I desire to read this stipulation to the jury at this time.

"In the District Court of the United States for the Western District of Washington, Northern Division.

No. 8861.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE JEWETT SEDAN AUTOMOBILE, Washington License No. 178080, Engine Number 44079, and Tools and Accessories, and LUTHER L. NEADEAU,

Libelees,

PORT GARDNER INVESTMENT COMPANY, a Corporation,

Claimant.

STIPULATION.

It is hereby stipulated and agreed, by and between the United States of America, by Thos. P. Revelle, United States Attorney, and John W. Hoar, assistant United States attorney, and Port Gardner Investment Company, a corporation, the above-named claimant, by Messrs. Grinstead, Laube & Laughlin and Thomas E. Davis, its attorneys, that the following facts are admitted to be true and that no proof shall be required of said facts at the trial of the

above-entitled cause, either party being at liberty to offer testimony as to any other or additional facts not herein mentioned.

First. That the Port Gardner Investment Company is a [72½—32] corporation, organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in the city of Everett, in said state, and that it is authorized to do and is doing, business in the said city of Everett as a finance and discount corporation, dealing largely in the business of discounting automobile paper.

Second. That on the 15th day of March, 1924, W. S. Guy, doing business under the assumed or trade name of W. S. Guy Motor Sales, in the city of Everett, Washington, and engaged in the business of dealing in automobiles, was the owner of, and in possession of, the Jewett Sedan automobile involved in this case and the tools and accessories thereunto belonging, and on said day delivered said automobile and tools and accessories to Luther L. Neadeau, under a conditional sales contract, a copy of which is attached to the claim of claimant on file herein.

Third. That at the time of delivery of said automobile to said Luther L. Neadeau, and at the time of the execution of said conditional sales contract said W. S. Guy did not know, and had no notice or knowledge, that the said Luther L. Neadeau intended to use or would use said automobile for the transportation, deposit or concealment of intoxi-

cating liquors, or in any other illegal manner and said W. S. Guy was not advised and had no knowledge or notice, prior to the time said automobile was seized by the officers of the United States Government and that said automobile was being used, or had been used, or was intended to be used in any illegal manner.

Fourth. That the total purchase price of said [73—33] automobile, to be paid by said Luther L. Neadeau, was the sum of Sixteen Hundred Fifty Dollars ($1650.00), exclusive of interest and insurance, of which amount Six Hundred Fifty Dollars ($650.00) was paid in cash, and the remainder, including interest and insurance, amounted to Eleven Hundred Thirty-four and 40/100 Dollars ($1134.40), which was to be paid in ten monthly installments, beginning April 29th, 1924, of One Hundred Thirteen and 44/100 Dollars ($113.44) each.

Fifth. That after delivery of said car said Luther L. Neadeau made three payments as follows:

June 4, 1924 $113.44
June 17, 1924, 113.44
Aug. 1, 1924, 113.44

and that the balance remaining unpaid at the time said car was seized, and now remaining unpaid, is the sum of Seven Hundred Ninety-four and 08/100 Dollars ($794.08).

Sixth. That after the delivery of said car to said Luther L. Neadeau said W. S. Guy Motor Sales assigned the conditional sales contract herein-

above mentioned to Port Gardner Investment Company, the claimant herein, a copy of which assignment is attached to the claim of the claimant herein, and that said Port Gardner Investment Company is now, and at all times since the date of said assignment, the owner of said conditional sales contract and of all the rights and property therein mentioned given it by said assignment; nor any of its officers, agents or employees knew, at the time of the taking of said assignment, or at any other time prior to the time of the seizure of said automobile by the United States Government that said automobile was being used, or was intended to be used, in any illegal manner. [74—34]

THOS. P. REVELLE,
J. W. HOAR,
Attorneys for Libelant.

GRINSTEAD, LAUBE & LAUGHLIN and
THOMAS E. DAVIS,
Attorneys for Claimant."

Now, if your Honor please, I have a copy of the conditional sales contract certified by the County Auditor of Skagit County as a true and correct copy of the conditional sales contract on file in his office, which I would like to have marked as Exhibit "B," and offer it in evidence in this case.

The COURT.—It will be admitted.

(Certified copy above referred to marked Claimant's Exhibit "B," and admitted in evidence.)

TESTIMONY OF L. L. NEADEAU, FOR CLAIMANT.

L. L. NEADEAU, called as a witness on behalf of the claimant, was duly sworn and testified as follows:

Direct Examination.

(By Mr. DAVIS.)

Q. Your name is L. L. Neadeau?

A. Yes, sir.

Q. You are the person who was driving the automobile in question, being the Jewett sedan?

A. Yes, sir.

Q. On the 9th day of August, 1924? A. Yes.

Q. At the time it was seized?

A. Yes. [75—35]

Q. At that time, Mr. Neadeau, you had some intoxicating liquor in the car? A. Yes, sir.

Q. Some such stuff as this (referring to Libelant's Exhibit 1)? A. Yes.

Q. And have pleaded guilty? A. Yes.

Q. To having transported it and having it in your possession? A. Yes, sir.

Q. In placing that intoxicating liquor in that car or in hauling it around from wherever you obtained it to the place where it was seized, did you have in mind any intent to deprive the Government of any taxes? A. No, sir.

Mr. HOAR.—Just a minute. I object to that question as calling for a conclusion of the witness, what he had in mind. He can state what he did.

(Testimony of L. L. Neadeau.)

The COURT.—I think he is entitled to deny categorically the allegation that he had this fraudulent purpose. Objection overruled.

Q. Did you know at that time that there was any tax on any such liquor as you had in the car?

A. I did not, no.

Mr. HOAR.—That is objected to as immaterial; he is presumed to know the law.

Mr. DAVIS.—It is quite a presumption for a layman, your Honor. I confess I am of the opinion there is not any law providing for a tax on it, but that is a [76—36] question on which attorneys differ.

Mr. HOAR.—I object to the attorney's remarks there.

The COURT.—Objection overruled. It is a mixed question of law and fact.

Q. You have already answered that?

A. I didn't know there was any such thing.

The COURT.—Read the question.

(Question read.)

The COURT.—Objection overruled.

A. No, sir.

Q. In having that liquor in the car did you have any intent to deprive the Government of any tax?

A. No, sir.

Q. What was your real motive in having it there?

A. Taking it home to drink it.

Q. To get it home? A. Yes, sir.

Q. To transport it? A. Yes, sir.

(Testimony of L. L. Neadeau.)

Q. Mr. Neadeau, you are the vendee named in the conditional sales contract which I have referred to?

A. Yes, sir.

Q. You are the party who obtained delivery of this automobile in question from the W. S. Guy Motor Sales under the conditional sales contract?

A. Yes.

Q. You heard our stipulation as to the amount still due the Port Gardner Investment Company?

A. Yes, sir. [77—37]

Q. In case this automobile should be forfeited to the United States Government, would you be able to pay the Port Gardner Investment Company the balance due? A. No, sir.

Mr. HOAR.—Just a minute. I object to that question as to whether he could pay it or not.

The COURT.—What is your object in asking that question?

Mr. DAVIS.—My object is to show that the party who would be punished here is the innocent party. If Mr. Neadeau were worth anything we could collect this money from him, and then we really would not be hurt by the Government taking the car. The only person who would suffer then would be Mr. Neadeau.

The COURT.—Objection sustained.

Mr. DAVIS.—Exception, please.

The COURT.—Allowed.

Mr. DAVIS.—Does your Honor think it would not make any difference?

The COURT.—Not if you expect to submit this case to the jury.

Mr. DAVIS.—The turn this case has taken, I think it has gone out of the field of the Internal Revenue Act, your Honor, and it has come under the National Prohibition Act. It has been shown positively and affirmatively, by the United States itself that the car has already been convicted under the National Prohibition Act, and the man was convicted of transporting liquor.

The COURT.—The car was not described in the information. [78—38]

Mr. DAVIS.—That would not make any difference.

The COURT.—That may be your view, but it is not the Court's view.

Mr. DAVIS.—It has been decided in several cases recently that where a man is charged with transporting liquor and is convicted, and the car is convicted, that there is an election there to proceed under the National Prohibition Act. The statute expressly provides they cannot proceed both ways.

The COURT.—If the car had been described in the information so the Court could have issued a show cause order describing the car, directing anyone interested to come in and make a claim to it, the Court might listen to your argument.

Mr. DAVIS.—That has never been the practice, though, as I understand it.

The COURT.—I decline to disagree with you. Of course the Court may easily be mistaken.

Mr. DAVIS.—The only purpose I had in this was that taking a liberal view of the pleading, even if the Government would not be entitled to forfeit under the Internal Revenue Act, they might be entitled to forfeit the interest of anyone except an innocent party under the National Prohibition Act, and I want to show that the innocent party would be the one that would suffer.

The COURT.—Now, coming back to this information in the case in which this defendant pleaded guilty.

Mr. DAVIS.—Yes.

The COURT.—Now, if the automobile was described [79—39] by number, there would be something on the record, and it might be the duty of the Court to direct that anyone claiming that car be given a day to show why it should not be forfeited. But the Court certainly is not going to,—if this is a court of record,—to dig into what the testimony was regarding what particular car this transportation took place in, and go out and make an order regarding it. It ceases then to be a court of record. You cannot, by looking at that information, say whether it was one car or another.

Mr. DAVIS.—No, that is possibly true that you could not look at the information and say whether it was one car or another. But the statute expressly provides that where a man is found guilty of transporting liquor in an automobile, the officers are forced to take possession of the car, and upon his conviction of the crime of transporting, the Court

(Testimony of L. L. Neadeau.)

shall issue a show cause order. It does not say that the car has to be described in the information, and I never saw an information in which they described the particular car by number so that you could go out and identify the car from the information.

The COURT.—I think the record proper has to describe the car.

Mr. DAVIS.—That is not the way the statute provides. The statute makes it mandatory for them to take possession of the car, and it says upon conviction of the offender for transporting, the show cause order shall be issued.

The COURT.—I sustain the objection. [80—40]

Mr. DAVIS.—That is all, Mr. Neadeau.

Cross-examination.

(By Mr. HOAR.)

Q. What is your business, Mr. Neadeau?

A. Farmer.

Q. How much land do you have up there?

A. Ten acres, sir.

Q. What do you raise?

A. Potatoes and garden stuff.

Q. How much of a family do you have, Mr. Neadeau? A. Three children.

Q. You were taking this five gallons home for the whole family, were you?

A. If they wanted some of it they could have it.

Q. That was the only purpose of taking it home?

A. Yes, sir.

Q. Where did you get it?

A. I bought it from a fellow.

(Testimony of L. L. Neadeau.)

Q. From whom? A. From a fellow.

Q. Who? A. I do not now his name.

Q. Where? A. Monroe.

Q. Did he have a place of business there?

A. No.

Q. Where? A. On the highway.

Q. How long had you known this party? [81—41]

A. I didn't know him only the day before.

Q. You made arrangements to get this liquor at that time? A. Yes, sir.

Q. Do you know what kind of liquor that is?

A. No, sir.

Q. Did he tell you where he got it?

A. No, sir, I did not ask him.

Q. Did he tell you whether he made it himself or whether he got it from somebody else?

A. No, sir, he just told me how much it cost, that is all.

Q. Do you have any other income than that farm?

Mr. DAVIS.—I submit that is improper cross-examination.

Q. Just the operation of this farm?

Mr. DAVIS.—This gentleman has pleaded guilty to everything charged in that information.

The COURT.—What is the purpose in asking that question?

Mr. HOAR.—He has testified he had this liquor for his own use, and it goes to his intention. It is for the jury to say whether a man raising potatoes would want that much liquor.

Mr. DAVIS.—I do not think, your Honor, that it would show he had much more income than if he had some other undertaking.

The COURT.—Objection sustained.

Mr. HOAR.—He is paying $113 a month on ten acres, and it is a question for the jury whether they believe he was handling this liquor for his own personal use or on an enlarged scale. [82—42]

Mr. DAVIS.—I do not think it would make any difference.

The COURT.—Objection sustained.

Mr. HOAR.—That is all.

Mr. DAVIS.—That is all, Mr. Neadeau.

(Witness excused.)

The COURT.—Is there anything further?

Mr. DAVIS.—That is all, your Honor.

The COURT.—Any rebuttal?

Mr. HOAR.—No, your Honor.

The COURT.—You may address the jury.

(Argument to jury by respective counsel.)

The COURT.—The Court will charge the jury in the morning. Mr. Hoar, something was said about taking time to compare that affidavit with the copy.

Mr. DAVIS.—The search-warrant on the affidavit.

Mr. HOAR.—I do not know that it becomes material.

The COURT.—It is attached to the affidavit, is a part of the affidavit. You are asking that it be detached from the affidavit?

Mr. DAVIS.—I want it to go in evidence. I do not care whether the affidavit is in or not. I would

rather not have the affidavit in, because there is no use taking it out of the other files.

The COURT.—You may examine that, and if you have any objection to it being detached, and using the copy instead of the original, you may state it in the morning, and the Court will rule on it then.

(Whereupon at five o'clock P. M. further hearing herein was continued until Wednesday, January 7, 1925, at 10:00 A. M.) [83—43]

CONTINUATION OF PROCEEDINGS.

January 7, 1925, 10:00 o'clock A. M.

INSTRUCTIONS OF THE COURT TO THE JURY.

The COURT.—The jury are instructed in this case that the information alleges that this car described as one Jewett sedan, giving the license number and engine number, tools and accessories, were seized by Mr. Whitney, Deputy Collector of Internal Revenue, and held in this district; that the seizure was because of the violation of the Internal Revenue law in that this car was used by Luther L. Neadeau for the removal, deposit and concealment of certain distilled spirits.

Mr. DAVIS.—Your Honor, it alleges more than that.

The COURT.—It alleges that it was used for the removal, deposit and concealment of this liquor with the intent of defrauding the United States out of the tax that was due and unpaid on this liquor so alleged to be removed, deposited and concealed in the car.

The claimant has interposed an answer denying these allegations in the answer.

The burden of establishing by a preponderance of the evidence the truth of the allegations of the information rests upon the prosecution, and before you can return a verdict of guilty in the case against this automobile and its accessories, the prosecution must show the truth by a fair preponderance of the evidence of every material allegation in the information.

Among these allegations that the burden rests upon the prosecution of establishing by such evidence, [84—44] is the allegation that a tax on these distilled spirits alleged to have been deposited in the car was unpaid; and further the burden of establishing that the distilled spirits were either deposited in the car as alleged, that is, by Neadeau, or that they were concealed in the car by Neadeau; and further that such deposit or concealment was with the intent to defraud the United States out of the unpaid tax on this liquor. Unless the prosecution has established by a fair preponderance of the evidence those facts, your verdict will be not guilty.

So that you may understand this case, as long as you have tried cases where individuals have been prosecuted for violations of the Volstead law, the Court will explain to you that this is not a proceeding against an individual; it is a proceeding against this car. Under certain circumstances a thing can be guilty. That is, where it is made the instrumentality of defrauding the Government under certain

circumstances or used in an effort to defraud the Government.

Under such circumstances as those alleged in this case, which is a violation of the Internal Revenue Act, the law is that if the party claiming the car, as this claimant here alleges,—or it alleges, rather, that this car was sold on a conditional sales contract, and that part of it was paid for, and part was not paid for, and that the title to the car remained in the seller, and that the seller assigned the contract to the present claimant, and that neither of these parties had any idea that the car was going to be used [85—45] in the illicit handling of liquor.

These allegations the Court instructs you to disregard, for the law is, under this statute, that if the seller of a car by selling it and delivering its possession into the custody of the buyer, the seller trusts him, he allows him to use the car. The Government has no hand in it; the Government is innocent entirely of these dealings between these parties. The seller by delivering the car over to the buyer puts him in possession to use it as he pleases, legally or illegally, and if he uses it to violate this statute, the car is guilty, and both the buyer and the seller lose all rights in the car by that forfeiture.

That is not true under the National Prohibition Law. That is, where you have had cases where it is alleged that a party was transporting liquor in a car, an innocent seller like the claimant is here, could protect his interest, but not so under this statute. Now, it may not be necessary for the Court to instruct you concerning differences in these two stat-

utes, but as long as counsel have argued it to you, it may not add to your confusion if the Court explains to you wherein this difference lies.

Now, under the National Prohibition law, the Volstead law, where a car is concerned, it is a matter of transportation. Now, transportation means moving from one place to another. Under this law, so far as this information accuses the car of the removal of the liquor, you are instructed to disregard that allegation of removal, because there is nothing in the information [86—46] to say where it was removed from. The statute in so far as it uses the word "removal" contemplates the removal from a distillery or bonded warehouse, or some place where the liquor might remain without the payment of tax. But there is nothing said in this information about a distillery, warehouse, or any other place, if any such there be, where liquor might remain legally without the payment of the tax.

So that leaves in the information the charge that the car was used for the deposit and concealment. You can readily understand that under the Volstead law, transportation, involving the movement from place to place, is not the same thing as using a car for the deposit and concealment of liquor, because you can deposit and conceal liquor in a car without its ever moving.

Under the Volstead law the liquor must be of a certain character. It must be fit for beverage purposes. Under the law under which we are proceeding here, it may be fit or unfit for beverage purposes as long as it is distilled spirits.

Not only are there these differences between these two laws, but the law under which we are proceeding now has this additional requirement, that the liquor be subject to a tax, and if that tax be not paid, which would not make any difference as far as the Volstead law was concerned, the transporting of the liquor is made illegal under the Volstead law whether the tax has or has not been paid. Then, under this statute under which we are proceeding now there is this [87—47] additional requirement: The deposit or concealment of the liquor in the car must have been with the intent to defraud the United States out of this revenue due on the liquor.

As you will have to consider the evidence in the case regarding whether the tax had been paid on this liquor and the alleged intent with which the deposit and concealment was made, it may be of further help to you if the Court explains to you briefly something concerning the customs laws and the internal revenue law.

Now, there was a customs officer on the stand yesterday who explained to you that if liquor was brought into the United States from Canada that the practice was that the customs officer would have the Internal Revenue officer place stamps on the imported liquor. There is no direct evidence in this case that this was imported liquor. This evidence was put in by the Government in an effort to prove a negative, that is, establish that this liquor was subject to a tax no matter where it came from.

Now, when intoxicating liquor is imported into the United States, at least in casks and kegs, the officers of the customs themselves put a stamp on

the container as evidencing the payment of customs duties, and this stamp is canceled by marks across it that extend not only across the stamp but on the wood on either side of the stamp, certain black lines, and then so that it may not be removed and used again not only is it immediately canceled and scratched up so as to [88—48] destroy it, but they varnish it over, the stamp and the wood, to render it still further difficult to work any fraud on the customs.

You have heard the evidence from this customs officer regarding what that officer would probably do, to show that the internal revenue was paid for the liquor in such a container. So the liquor would be not only subject to a duty coming into the United States from the outside, but as soon as it reached the United States it would be subject also to this internal revenue tax that the witness described to you. That is, that is the evidence of this witness. The Court is not instructing you to that effect as a matter of law, but simply calling your attention to what the witness testified to.

Now, regarding the internal revenue. The Government is kept up and its expenses paid by taxes not only placed on certain commodities and merchandise and articles that are brought into the United States from the outside which are called customs, but part of that revenue is derived from taxes placed on articles or merchandise or commodities produced in the country. Among these articles that are so taxed internally, that is that were produced in the country, are intoxicating liquors and distilled spirits.

Now, where a wholesaler places five wine gallons or more of distilled spirits in a keg or other container, it is his duty to place on that a stamp as evidencing the payment of the internal revenue on the liquor, and it must be so placed by him on such container [89—49] before he sends it out from his establishment.

You have a right to take into account what the Court has told you regarding the law, this matter of payment of taxes on liquor and the method that would be used to show that that tax was paid, and what the evidence has shown in this case regarding that keg which has been testified to as having been found in the car, in determining whether in fact the tax due on this liquor had been paid.

The Court instructs as a matter of law that such liquor was and is liable to a tax, so you need not concern yourself with that fact. The Court instructs you that as a matter of law: That is, such liquor as has been testified in this case this is. But that leaves for you to determine the question of fact about whether that tax had been paid. So you will not only take into account what the Court has told you regarding the law, but what the evidence has shown regarding what, if any, stamps were on this keg, and what the evidence has shown regarding whether any tax has been paid, as shown by the books to have been paid in to this internal revenue district.

If you find by a fair preponderance of the evidence that the tax had not been paid on this liquor, it would then be your duty to consider next whether this

liquor was deposited or concealed in this car. Now, the words "deposit and conceal" as used in this information and these instructions, mean what you ordinarily understand to be meant by those words. It is not necessary for you to find that the liquor had been both [90—50] deposited and concealed in this case, but if it was deposited there, as alleged in the information, so far as that point is concerned, you would be warranted in returning a verdict of guilty, even though there had been no fair preponderance of the evidence that it was concealed in it. If you are, in addition to what I have told you, satisfied by a fair preponderance of the evidence that the liquor was either deposited or concealed in the car, as alleged in the information, you would then proceed to consider whether a fair preponderance of the evidence showed that it had been deposited or concealed in the car with the intent to defraud the United States out of the taxes due on the liquor.

Now, fraud is not presumed unless there is evidence to support it. But every man is presumed to intend the ordinary and natural consequences of his voluntary acts. That is, he is presumed to intend what would ordinarily and naturally follow the things that he voluntarily does in the absence of some explanation negativing that presumption. And if the ordinary and natural result of the liquor being there placed in the car or concealed in the car and handled in the manner that the evidence may have shown it to have been handled in this case, would in the absence of a discovery by the internal revenue officers, have resulted in the Government being defrauded out of that tax due on this liquor, then the

car being used by the authority of the owner, that is, with his consent, not necessarily his authority to use the car wrongfully, but authority to [91—51] use it, it would be presumed that it was the intent to defraud the Government out of its tax, and the car would be guilty. That is, if this presumption was not negatived or overcome by evidence showing that the party was innocent of any such intention.

In connection with this matter of intent to defraud the Government, the Court calls attention to the fact that Mr. Mooring testified that Mr. Neadeau told him this was moonshine liquor. Now, Mr. Whitney's testimony was that this expression "moonshine liquor" meant illicit liquor, that is, the very controlling purposes for which it is made would be to avoid the law and the revenues imposed upon it by law. If you give credit to that testimony of Mr. Mooring's—

Mr. HOAR.—Mr. Simmons, I believe, your Honor.

The COURT.—Mr. Simmons. I am confusing Mr. Simmons with Mr. Mooring, who was a witness in the prior case. You would take that into account in determining whether Mr. Neadeau intended to defraud the Government out of any tax that was due on the liquor.

In the course of these instructions the Court has told you where the burden rested upon the Government of establishing issues by a fair preponderance of the evidence. A fair preponderance of the evidence is the greater weight of the evidence; that evidence preponderates which so appeals to your intelligence, your reason, and your experience, as to

create and induce a belief in your minds where there is contradiction in the evidence, or a dispute. That evidence preponderates which is so strong in these particulars as to [92—52] create and induce a belief in your minds in spite of the opposing evidence and in spite of any assaults or attacks made upon it by counsel in argument, or any of his reasonings or deductions that he may have tried to get you to apply in explaining the matter.

You are in this case, as in every case where questions of fact are brought to the jury, the sole and exclusive judges of every question of fact in the case, the weight of the testimony and the credibility of the witnesses. Unless specially requested to do so by counsel I will not elaborate upon that instruction, because I have done so in a number of cases recently where members of this panel were sitting on other juries.

Counsel in his argument stated to you that it would be your duty to acquit this car because if you were driving your car and invited somebody to ride with you and you let somebody have your car and they invited somebody else to ride with them and he had a bottle of liquor in his pocket, away would go your car. Now, that is not the law, because in such a case the liquor would not be deposited in the car or concealed in the car. The liquor under those circumstances would be concealed on the person of the party who had that bottle on his person.

Mr. DAVIS.—I think, your Honor, my argument was if the party getting in the car had a bottle of

liquor which he placed in the car, not what he had in his pocket.

The COURT.—I did not so understand it.

Mr. DAVIS.—That is the way I meant it because I am perfectly [93—53] familiar with that rule that your Honor has announced.

The COURT.—It is time enough for the Court to decide that as a question of law when it arises.

But the Court instructs you as far as this case is concerned that the law is that it is the party trusted with the car that abuses it in its use. If you picked up somebody, a neighbor, and was hauling him in your car and he took a bottle out of his pocket and to your knowledge put it in the pocket of the car, and you went your way with it concealed in the pocket of the car, your car might go, and very likely would if it were found out, the other elements of this offense being established. But if he, without your knowledge, while you were driving your car, slipped it under the seat of your car, and you went your way, your car would not be forfeited, because while you have trusted him to ride, you have not trusted him with your car; you have not let him control your car to the prejudice of the Government.

Is there anything further before explaining the verdict?

Mr. DAVIS.—Your Honor, I want to except to the instruction which your Honor gave to the effect that the intoxicating liquor found in this car is subject to a tax.

The COURT.—I said such liquor is subject to a tax.

Mr. DAVIS.—Whatever it was, that such liquor was subject to a tax, on the ground, as I understand the law, that the so-called tax has been defined by the Supreme Court as being a penalty and not a tax, and that before any tax [94—54] can be assessed on anyone for having such liquor in his possession, the person against whom the tax is attempted to be assessed, must be notified and have a hearing. That is the ruling in the Wardall case in the United States Supreme Court. That is the most recent expression of the United States Supreme Court on this subject.

The COURT.—Exception allowed.

Mr. DAVIS.—I want to except to that portion of the Court's instruction stating that the jury are at liberty to disregard the affirmative matter set up in the claim of the claimant herein showing that this conditional sales contractor vendor,—that there is a certain balance due on the car, and that it is innocent of any intent or knowledge that the car was to be used in the violation of this law or any other law.

The COURT.—Exception allowed.

Mr. DAVIS.—I object to the remarks of the Court relative to the customs laws on the ground that there is no evidence that this liquor which was found in this car was brought into this country from elsewhere, that it had ever passed through the customs, or that it should have passed through the customs; also on the grounds that the laws and

regulations which the Court had reference to as to the matter of stamping liquor imported into the country were laws and regulations which were carried into effect prior to the passing of the present statute, and that at present under the laws such liquor, as the liquor in question, could not legally be imported into the country, and there would be no way in which the [95—55] Government could get any tax, either customs or internal revenue, on any such liquor being brought into the country from another country or foreign country.

The COURT.—Exception allowed. But I instruct the jury now that since the Volstead law the customs will not permit or will not allow the bringing into *of* the United States intoxicating liquor fit for beverage purposes, unless there is a permit to bring it in granted by the Commissioner of Internal Revenue, and that in a state such as this that has a bone dry law, no such permits are given.

Mr. DAVIS.—I also except to that portion of the Court's instruction which dwelt upon the fact that the internal revenue laws were passed for the purpose of keeping up and paying the expenses of the Government, and that the taxes imposed upon liquors such as the liquor found in this case went towards the support and upkeep of the Government, on the ground and for the reason that such laws are no longer applicable to liquor, such as the liquor in question in this case, in that there is no way in which the Government can collect any tax or obtain any revenue upon liquors such as this liquor in question, and that the so-called

tax that is now claimed to be imposed upon this liquor is not a tax for revenue purposes, but is a tax levied, or penalty, rather, levied in aid of the enforcement of the prohibition law of the United States, and as additional punishment against a person who manufactures or sells or traffics in liquor.

The COURT.—Exception allowed. [96—56]

Mr. DAVIS.—I object to the Court's remarks to the jury in regard to the evidence of Mr. Simmons, to the effect that at the time of the seizure of the car Mr. Neadeau said the liquor in question was moonshine liquor. And I object to the further remarks of the Court to the effect that the manufacture of illicit liquor or moonshine liquor is primarily presumed to be for the purpose of defrauding the Government out of a tax, in that such instruction is not applicable to the law as it is at present. That would have been a correct instruction prior to the time the National Prohibition Law or the bone dry act of the State of Washington, when liquor could have been legally manufactured and legally subject to taxes, and where the only purpose of anyone manufacturing liquor, except in an authorized distillery, would have been to avoid a tax but that it is apparent since the passage of the Volstead act and the constitutional amendment prohibiting the trafficking, manufacturing and selling of intoxicating liquor and the bone dry law of the State of Washington, that the purpose of anyone trafficking or dealing in moonshine liquor would be otherwise than to prevent the Government from collecting a tax. In other words, there is no way in which

they could have moonshine whiskey in existence except by illicit manufacture, and that the purpose could just as well be to get liquor to drink or sell as to defraud the Government of any tax.

The COURT.—Exception allowed.

Mr. DAVIS.—I also request the Court to give the jury Instruction [97—57] No. 22 and No. 23 requested by the claimant. I do not know whether I should read those instructions. Is it the practice to read them into the record?

The COURT.—Instructions Nos. 22 and 23?

Mr. DAVIS.—Yes, your Honor, those are additional instructions.

The COURT.—I will examine this instruction No. 22. That is refused.

Mr. DAVIS.—Exception, please.

The COURT.—Exception allowed.

Mr. DAVIS.—That is 22?

The COURT.—That is 22. Now, I will read No. 23. Well, the same thought seems to be in both of those instructions. That is, the completed or successful fraud is not necessary. Exception allowed to both of them.

Mr. DAVIS.—That was not my intention. My intention was that if the act when completed would not result in a fraud, then the doing of the act would not be evidence of an intent to defraud.

The COURT.—I think I have covered all that you are entitled to in those instructions in the instructions I have given the jury.

Mr. DAVIS.—The Court will not instruct the jury to that effect?

The COURT.—I think I have covered—

Mr. DAVIS.—I mean to the effect that I have just stated, that if the doing of an act when completed would not result in defrauding the Government out of any tax, then the doing of the act would not be evidence of an [98—58] intent to defraud the Government of any tax.

The COURT.—I have given as far as I think the law justifies.

Mr. DAVIS.—Exception.

The COURT.—Exception allowed.

Mr. DAVIS.—I also want to except to the Court's refusal to give claimant's requested instructions 1, 3, 4, 5, 6, 8, 9, 10, 11, 12½, 14, 15, 16, 17, 20 and 21.

The COURT.—Exceptions allowed.

Mr. DAVIS.—That is all.

The COURT.—There are two forms of verdict. One recites that the jury finds the automobile, and so forth, is guilty as charged in the information, and the other one finding the automobile, and so forth, not guilty as charged in the information. "And so forth" here refers to the accessories. Is a sealed verdict agreeable in case the jury agree out of hours?

Mr. DAVIS.—Yes, your Honor.

The COURT.—The jury will take out with them the information, the claim and the answer of the claimant. This search-warrant attached to the affidavit, did you compare it?

Mr. HOAR.—I will admit it, your Honor.

The COURT.—Is there any objection to separat-

ing this from Mr. Simmons' affidavit and then returning it later?

Mr. DAVIS.—No, your Honor, it would be available anyway in one of the files or the other.

The COURT.—The clerk will after the verdict is returned in this case reattach this warrant to this affidavit.

When you have reached a verdict you will have your [99—59] foreman sign whichever one of the verdicts you agree upon and return it into court. If you agree upon a verdict at such time as the court is not in session, you will seal it up in an envelope, and leave it with your foreman to be returned at the next session of court. You may now retire.

(Jury thereupon retired to deliberate upon its verdict.) [100—60]

* * * * * * * * * *

Comes now the above-named claimant, Port Gardner Investment Company, a corporation, and proposes the foregoing, together with all of the exhibits referred to therein and admitted in evidence by the Court, as its bill of exceptions in this cause and prays that the same may be duly allowed, settled, signed and certified by the Judge as provided by law.

Dated this 22d day of January, 1925.

GRINSTEAD, LAUBE & LAUGHLIN and
THOMAS E. DAVIS,

Attorneys for Claimant.

ACCEPTANCE OF SERVICE.

We the undersigned attorneys for the United States of America, the above-named libelant, hereby accept service of claimant's proposed bill of exceptions in the above-entitled matter and acknowledge receipt of a copy of the same this 22 day of January, 1925.

THOS. P. REVELLE,
J. W. HOAR,
Attorneys for Libelant. [101]

* * * * * * * * * *

ORDER SETTLING BILL OF EXCEPTIONS.

The foregoing bill of exceptions is hereby approved, allowed, settled and signed as a part of the record herein.

Dated this 22 day of January, 1925.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 27, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [102]

CLAIMANT'S EXHIBIT "B."

CONDITIONAL SALES CONTRACT.
W. S. GUY MOTOR SALES.

No. ——————

$1134.40 ———

Everett, Wash., March 15, 1924. 19—

FOR VALUE RECEIVED, I, the undersigned (hereinafter designated as the vendee), residing in

Monroe, No. R. F. D. #1 Street, County of Snohomish, State of Washington, promise to pay to the order of W. S. Guy Motor Sales, the purchase price of Sixteen Hundred and Fifty No/100 Dollars interest and insurance added, of which price the sum of Six Hundred Sixty and no/100 dollars is paid in cash, and the balance I agree to pay, together with 8% interest on unpaid balances each month at the following rate. . . . . . .Ten payments of $113.44. First payment due April 29th and on the 29th of each and every month until fully paid. Payments include interest and Insurance.

The consideration of the above and foregoing contract is the agreement of the said Vendor to sell and deliver to the undersigned Vendee, one Jewett Special, Style 5 pass. Sedan, Car No. 44037, Motor No. 44079 the delivery and receipt of which is hereby acknowledged, upon the conditions hereinbefore and hereinafter set forth, to wit: It is expressly agreed that the title and right of possession in and to the said property shall remain in said Vendor, its successors or assigns, until the above specified payments, with interest, have been fully made, then the title thereto shall vest in the undersigned Vendee. It is agreed that said property shall not be sold or removed from Snohomish County without the written consent of the said Vendor, its successors or assigns, Vendee agrees to pay all taxes and assessments on said Jewett Automobile before the same become delinquent. It is further agreed that in case of default in the payment of the said principal sum or any of the install-

ments above mentioned as the same shall fall due according to the terms and conditions hereof, or the undersigned Vendee shall sell or encumber, or attempt to sell or encumber, or remove said property from the place above mentioned, without the written consent of Vendor, its successors or assigns, or shall fail to pay taxes or assessments before the same become delinquent, or if any writ issued by any court or by any Justice of the Peace or any distress warrant shall be levied on said property, or if said Vendor, its successors or assigns shall at any time time deem themselves insecure; or in case any of the conditions of this contract are not strictly complied with by the undersigned Vendee, the said Vendor, its successors or assigns, shall have the right and option to either: [103]

FIRST: Terminate this contract, and may enter any premises with or without force of law, wherever the property is, or is supposed to be, and reclaim the same, the possession of these presents being sufficient authority therefor; and in case the said Vendor, its successors or assigns, shall retake possession of said property, as aforesaid, all moneys paid on the purchase thereof shall be retained as liquidated damages for the non-fulfillment of this contract, without relief from valuation or appraisement laws;

SECOND: Said Vendor, its successors or assigns, may declare the whole amount thereof remaining unpaid, due and payable, and enter any premises, with or without force of law, wherever said property is, or is supposed to be, and take possession thereof, the possession of these presents

being sufficient authority therefor, and sell said property at public or private sale, with or without notice to any parties interested (and the Vendor, its successors or assigns, may become a purchaser at said sale) and apply the proceeds of said sale upon the whole amount due, together with interest, costs and attorney's fees, as hereinafter provided; and should the proceeds of such sale be insufficient to pay the amount so remaining unpaid as aforesaid, together with interest, costs and attorney's fees and expenses of such sale, the undersigned Vendee agrees to pay the said Vendor, its successors or assigns, the balance so remaining unpaid;

THIRD: The said Vendor, its successors or assigns, may declare the whole amount thereof remaining unpaid due and payable and may commence an action in any court of competent jurisdiction, against the undersigned Vendee, or any parties interested herein, and all sureties or endorsers hereon, for the amount due under this contract, together with interest, costs and attorney's fees, and have its lien under this contract foreclosed, and the said property sold in the same manner as personal property is sold under mortgage foreclosure, and the proceeds of such sale applied towards the payment of the principal, interest, costs and attorney's fees, and if the proceeds of such sale are not sufficient to pay the full amount of the principal, interest, costs, and attorney's fees, then the said Vendor, its successors or assigns, shall have deficiency judgment for any balance remaining unpaid and that execution may be issued there-

for. It is also agreed that in case the undersigned Vendee fails to carry out the terms and conditions of this contract and make the payments as required herein, and in case the said Vendor, its successors or assigns, is required to retake said property or take and sell the same or commence suit or action as herein provided, the undersigned Vendee agrees to pay, in addition to the costs and disbursements provided by statute, such additional sum as may be adjudged reasonable, as attorney's fees and expenses of sale and collection. For valuable consideration each and every party signing or endorsing this instrument, and the installment notes aforesaid, hereby waives presentment, demand, protest and notice of non-payment thereof and binds himself thereon as principal. It is further agreed that the undersigned Vendee shall keep said property insured while this contract is in force in the name of and for the benefit of W. S. Guy Motor Sales, their successors or assigns, as their interest may appear, in the manner and to the extent specified or required at the time of the execution hereof. It is also agreed that the acceptance by Vendor, its successors or assigns, of any note or security for the faithful performance of this contract, either at the time of signing the same or at any time subsequent thereto, and any assignment of such note or other collateral by them shall not be deemed or held to be a waiver of their rights to enforce any of the provisions of this contract; provided, that such note or other collateral security be returned to the Vendee. This contract contains all

the agreements, between the parties, and there are no conditions not expressed herein, and no oral promises, agreements, undertakings, or understandings not set forth herein shall be binding on the Vendor, its successors or assigns. [104]

Executed in quadruplicate, this 15th day of March, 1924 A. D. 19——.

W. S. GUY MOTOR SALES.
By W. S. GUY (Seal)
Vendor.

——————————,
Agent for Vendor.

L. L. NEADEAU, (Seal)
Vendee.

——————————,
Collection Address.

This agreement is expressly subject to the approval of the Vendor and shall not be binding on Vendor until approved in writing hereon.

Dated this 15th day of March, 1924, A. D. 19——.

ASSIGNMENT.

The undersigned, W. S. Guy Motor Sales, the Vendor named in the foregoing contract, for value received does hereby sell, assign, transfer and set over unto Port Gardner Investment Co., all of its right, title and interest in and to the within and foregoing contract and all payments of every kind now due or may hereafter become due thereunder, including any note or notes secured by the contract, and does hereby guarantee that there is still unpaid upon said contract ———————— Dollars,

($1134.40) and together therewith does hereby sell, assign, transfer and set over the said instrument described in the foregoing contract and all equipment therewith and all property described in said contract, and does hereby authorize the purchaser hereof to collect all payments now due or hereafter to become due thereon and to give all acquittances and discharges therefor and to transfer the property herein described to the Vendee upon fulfillment thereof.

Dated at Everett, Washington, this 15th of Mar. 1924.

W. S. GUY MOTOR SALES. (Seal)
W. S. GUY.

In the presence of

____

____

332282. No. —— Conditional Contract Between W. S. Guy Motor Sales and————. Dated ———, 19——.

[Endorsed]: State of Washington, County of Snohomish,——ss. Filed at the request of M. J. Ferrell, on Mar. 24, 1924, at 10:50 o'clock A. M. Adrian Hulbert, County Auditor. By J. Hangen, Deputy. [105]

State of Washington,
County of Snohomish,— ss.

I, Adrian Hulbert, Auditor of Snohomish County, State of Washington, and *ex-officio* Recorder of Deeds in and for said County, do hereby certify the above and foregoing to be a true and correct

transcript of Conditional Sales Contract—W. S. Guy Motor Sales to L. L. Neadeau,—now on file in this office, File No. 332282.

WITNESS my hand and official seal this 24 day of December, 1924.

[Seal] ADRIAN HULBERT,
Auditor, Snohomish County, Washington.
By John Hangen,
Deputy. [106]

EXHIBIT "A."

Copy.

Local Form No. 103.
United States of America,
Western District of Washington,
Northern Division,—ss.

SEARCH-WARRANT.

The President of the United States to the Marshal of the United States for the Western District of Washington, and His Deputies or Either of Them, and to Any Federal Prohibition Officer or Agent or the Federal Prohibition Director of the State of Washington, or Any Federal Prohibition Agent of Said State, and to the United States Commissioner of Internal Revenue, His Assistants, Deputies, Agents or Inspectors, GREETING:

WHEREAS, J. M. Simmons, a Federal Prohibition Agent of the State of Washington, has this day made application for a Search-warrant and made oath in writing, supported by affidavits, before the undersigned, a Commissioner of the United States

for the Western District of Washington, charging that a crime is being committed against the United States in violation of the NATIONAL PROHIBITION ACT OF Congress by one JOHN DOE RICHARDS AND RICHARD ROE JOHNSON, true names to this affiant unknown, proprietors and their employees; who was, on the 5th day of AUGUST, 1924, and is, at said time and place, possessing a still and distilling apparatus and materials designed and intended for use in manufacturing intoxicating liquor, and manufacturing, possessing, intoxicating liquor, all for beverage purposes, on certain premises of County of Snohomish, State of Washington, and in said District, more fully described as Second House on North Side of Duvall-Monroe Highway, and West from Highway bridge over Skykomish River in Snoh*i*m*o*sh County, State of Washington; and on the premises used, operated and occupied in connection therewith and under the control and jurisdiction of said above parties;

AND WHEREAS, the undersigned, is satified of the existence of the grounds of the said application, and that there is probable cause to believe their existence,

NOW, THEREFORE, YOU ARE HEREBY COMMANDED, and authorized and empowered in the name of the PRESIDENT OF THE UNITED STATES to enter said premises with such proper assistance as may be necessary, in the day time, or night time, and then and there diligently investigate and search the same and into and concerning said crime, and to search the person of said above

named persons and from him or her, or from said premises seize any or all of the said property, documents, papers and materials so used in or about the commission of said crime, and any and all intoxicating liquor and the containers thereof, and then and *there take* the same into your possession, and true report make of your said acts as provided by law.

GIVEN under my hand and seal this 7th day of August, 1924.

A. C. BOWMAN,
United States Commissioner, Western District of Wash.

Copy. (Exhibit "A.")

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 31, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [107]

---

* * * * * * * * *

PETITION FOR ORDER ALLOWING WRIT OF ERROR.

The said claimant, Port Gardner Investment Company, a corporation, feeling itself aggrieved by the judgment entered in the above-entitled cause on the 22d day of January, 1925, upon the verdict of the jury, in favor of said libelant and against said claimant, ordering the above-named respondent automobile forfeited, in which judgment and the proceedings leading up to the same, certain errors were committed to the prejudice of said claimant,

which more fully appear from the assignment of errors herein, comes now and prays said court for an order allowing said claimant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which said claimant shall give upon said writ of error, and that upon the furnishing of said security all further proceedings in this cause be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit. And said [108] claimant further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals.

Dated this 30th day of January, A. D. 1925.

GRINSTEAD, LAUBE & LAUGHLIN and
THOMAS E. DAVIS,

Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 30, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [109]

---

* * * * * * * * *

ASSIGNMENT OF ERRORS.

Comes now Port Gardner Investment Company, a corporation, claimant above named, and assigns

the following errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit:

I.

The District Court erred in sustaining an objection by the United States to the following question asked the witness W. M. Whitney by claimant on cross-examination:

> "Mr. Whitney, the testimony of the United States officers up to the present time indicate that the liquor of which Exhibit 1 is a sample, was found in a 5-gallon keg in the rear of the automobile in question up near Monroe, Washington, on the 9th day of August, 1924? Will you tell the jury whether the fact that that liquor was in the car at the particular time in any way deprived the Government of any tax which it could have collected, or would have collected if the liquor had been anywhere else in the State of Washington at the time this seizure was made."

to which ruling of the Court claimant then and there duly excepted and its exception was allowed.

II.

The Court erred in sustaining the libelant's objection to the [110] following question asked the witness, L. L. Neadeau, a witness on behalf of plaintiff:

> "In case this automobile should be forfeited to the United States Government, would you

be able to pay the Port Gardner Investment Company the balance due?"

to which ruling the claimant then and there duly excepted and its exception was allowed.

III.

The Court erred in instructing the jury as follows:

"Under such circumstances as those alleged in this case, which is a violation of the Internal Revenue Act, the law is that if the party claiming the car, as this claimant here alleges, or it alleges, rather, that this car was sold on a conditional sales contract, and that part of it was paid for, and part was not paid for, and that the title to the car remained in the seller, and that the seller assigned the contract to the present claimant, and that neither of these parties had any idea that the car was going to be used in the illicit handling of liquor.

"These allegations the Court instructs you to disregard for the law is, under this statute, that if the seller of a car by selling it and delivering its possession into the custody of the buyer, the seller trusts him, he allows him to use the car. The Government has no hand in it; the Government is innocent entirely of these dealings between these parties. The seller by delivering the car over to the buyer puts him in possession to use it as he pleases, legally or illegally, and if he used it to violate this statute, the car is guilty, and both the buyer and the

> seller lose all rights in the car by that forfeiture."

to which instruction the claimant at the time duly excepted and its exception was allowed.

IV.

The Court erred in instructing the jury as follows:

> "Now, regarding the internal revenue. The Government is kept up and its expenses paid by taxes not only placed on certain commodities and merchandise and articles that are brought into the United States from the outside which are called customs, but part of that revenue is derived from taxes placed on articles or merchandise or commodities produced in the country. Among these articles that are so taxed internally, that is that were produced in the country, are intoxicating liquors and distilled spirits.
>
> "Now, where a wholesaler places five wine gallons or more of distilled spirits in a keg or other container, it is his duty to place on that stamp as evidencing the payment of the internal revenue on the liquor, and it must be so placed by him on such container before he sends it out from his establishment.
>
> "You have a right to take into account what the Court has told you regarding the law, this matter of payment of taxes on [111] liquor and the method that would be used to show that that tax was paid, and what the evidence has shown in this case regarding that keg which

has been testified to as having been found in the car, in determining whether in fact the tax due on this liquor had been paid.

"The Court instructs as a matter of law that such liquor was and is liable to a tax, so you need not concern yourself with that fact. The Court instructs you that as a matter of law. That is, such liquor as has been testified in this case this is. But that leaves for you to determine the question of fact about whether that tax has been paid. So you will not only take into account what the court has told you regarding the law, but what the evidence has shown regarding what, if any, stamps were on this keg, and what the evidence has shown regarding whether any tax has been paid, as shown by the books to have been paid in to this internal revenue district."

to which instruction the claimant at the time duly excepted and its exception was allowed.

V.

The Court erred in instructing the jury as follows:

"If you find by a fair preponderance of the evidence that the tax had not been paid on this liquor, it would then be your duty to consider next whether this liquor was deposited or concealed in this car. Now, the words 'deposit and conceal' as used in this information and these instructions, mean what you ordinarily understand to be meant by those words. It is not necessary for you to find that the liquor

had been both deposited and concealed in this case, but if it was deposited there, as alleged in the information, so far as that point is concerned, you would be warranted in returning a verdict of guilty, even though there had been no fair preponderance of the evidence that it was concealed in it. If you are, in addition to what I have told you, satisfied by a fair preponderance of the evidence that the liquor was either deposited or concealed in the car, as alleged in the information, you would then proceed to consider whether a fair preponderance of the evidence showed that it had been deposited or concealed in the car with the intent to defraud the United States out of the taxes due on the liquor.

"Now, fraud is not presumed unless there is evidence to support it. But every man is presumed to intend the ordinary and natural consequences of his voluntary acts. That is, he is presumed to intend what would ordinarily and naturally follow the things that he voluntarily does in the absence of some explanation negativing that presumption. And if the ordinary and natural result of the liquor being there placed in the car or concealed in the car and handled in the manner that the evidence may have shown it to have been handled in this case, would in the absence of a discovery by the internal revenue officers, have resulted in the Government being defrauded out of that tax due on this liquor, then the car being used

> by the authority of the owner, that is, with his consent not necessarily his authority to use the car wrongfully, but authority to use it, it would be presumed that it was the intent to defraud the Government out of its tax, and the car would be guilty. That is, if this presumption was not negatived or overcome by evidence showing that the party was innocent of any such intention."

to which instruction the claimant at the time duly excepted and its exception was allowed. [112]

VI.

The Court erred in instructing the jury as follows:

> "In connection with this matter of intent to defraud the Government, the court calls attention to the fact that Mr. Mooring testified that Mr. Neadeau told him this was moonshine liquor. Now, Mr. Whitney's testimony was that this expression 'moonshine liquor' meant illicit liquor, that is, the very controlling purposes for which it is made would be to avoid the law and the revenues imposed upon it by law. If you give credit to that testimony of Mr. Mooring's—
>
> Mr. HOAR.—Mr. Simmons, I believe, your Honor.
>
> The COURT.—Mr. Simmons. I am confusing Mr. Simmons with Mr. Mooring who was a witness in the prior case. You would take that into account in determining whether Mr. Nea-

> deau intended to defraud the Government out of any tax that was due on the liquor."

to which instruction the claimant at the time duly excepted and its exception was allowed.

VII.

The Court erred in instructing the jury as follows:

> "But the Court instructs you as far as this case is concerned that the law is that it is the party trusted with the car that abuses it in its use. If you picked up somebody, a neighbor, and was hauling him in your car and he took a bottle out of his pocket and to your knowledge put it in the pocket of the car, and you went your way with it concealed in the pocket of the car, your car might go, and very likely would if it were found out, the other elements of this offense being established. But if he, without your knowledge, while you were driving your car, slipped it under the *seat* of your car, and you went your way, your car would not be forfeited, because while you have trusted him to ride, you have not trusted him with your car; you have not let him control your car to be the prejudice of the Government."

to which instruction the claimant at the time duly excepted and its exception was allowed.

VIII.

The Court erred in instructing the jury as follows:

"Now, there was a customs officer on the stand yesterday who explained to you that if liquor was brought into the United States from Canada that the practise was that the customs officer would have the internal revenue officer place stamps on the imported liquor. There is no direct evidence in this case that this was imported liquor. This evidence was put in by the Government in an effort to prove a negative, that is, establish that this liquor was subject to a tax no matter where it came from.

"Now, when intoxicating liquor is imported into the United States, at least in casks and kegs, the officers of the customs themselves put a stamp on the container as evidencing the payment of customs duties, and this stamp is cancelled by marks across it that extend not only across the stamp but on the wood on either side of the stamp, certain black lines, and then so that it may not be removed and used again not only is it immediately canceled and [113] scratched up so as to destroy it, but they varnish it over, the stamp and the wood, to render it still further difficult to work any fraud on the customs.

"You have heard the evidence from this customs officer regarding what that officer would probably do, to show that the internal revenue was paid for the liquor in such a container. So the liquor would be not only subject to a duty coming into the United States from the outside, but as soon as it reached the United

> States it would be subject also to this internal revenue tax that the witness described to you. That is, that is the evidence of this witness. The Court is not instructing you to that effect as a matter of law, but simply calling your attention to what the witness testified to."

to which instruction the claimant at the time duly excepted and its exception was allowed.

IX.

The Court erred in refusing to give the jury claimant's requested instruction #1, reading as follows:

> "Members of the jury, you are instructed to find in favor of the claimant and against the libelant."

to which refusal said claimant duly excepted and its exception was allowed.

X.

The Court erred in refusing to give the jury claimant's requested instruction #3, reading as follows:

> "You are instructed that the so-called tax imposed on intoxicating liquors by the Revenue Laws and Tariff Laws of the United States are penalties and not taxes in the sense that the word 'taxes' is used in Section 3450 of the United States Revised Statutes and that before a tax, so called, or penalty, shall be assessed against or collected from any person on account of responsibility for the manufacture or sale of intoxicating liquor, the evidence must first be produced of the illegal manufacture or

sale of such intoxicating liquor and a hearing had upon the question of such illegal manufacture or sale."

to which refusal said claimant duly excepted and its exception was allowed.

XI.

The Court erred in refusing to give the jury claimant's requested instruction #4, reading as follows:

"You are instructed that in this case there is no evidence that there was any hearing had or evidence given of the illegal manufacture or sale of any intoxicating liquor in controversy in this case prior to the time the automobile in question was seized by the Government."

to which refusal said claimant duly excepted and its exception was allowed. [114]

XII.

The Court erred in refusing to give the jury claimant's requested instruction #5, reading as follows:

"You are instructed that in the absence of a hearing and evidence prior to the time of the seizure of the car to determine that the person manufacturing, selling or trafficking in intoxicating liquor found in the car should have a tax assessed against him, said car was not subject to forfeiture."

to which refusal said claimant duly excepted and its exception was allowed.

XIII.

The Court erred in refusing to give the jury

claimant's requested instruction #6, reading as follows:

> "You are instructed that in no event can a tax imposed on intoxicating liquor be enforced by forfeiture of an automobile in which the intoxicating liquor was found, but that if such tax is collectible from anyone, it is collectible only from the person who manufactured, sold or trafficked in such intoxicating liquor."

to which refusal said claimant duly excepted and its exception was allowed.

XIV.

The Court erred in refusing to give the jury claimant's requested instruction #9, reading as follows:

> "You are instructed that the words 'removal, deposit or concealment' as used in the information mean removal, deposit or concealment from a place where the commodity is required by law to be kept so that the Government may there inspect it and collect the tax thereon, such as a distillery, a bonded warehouse, or other place where intoxicating liquor is required by law to be kept until the tax thereon has been paid."

to which refusal said claimant duly excepted and its exception was allowed.

XV.

The Court erred in refusing to give the jury claimant's requested instruction #9, reading as follows:

> "You are instructed that the burden is upon the United States Government to show that the

> intoxicating liquor was being removed, deposited or concealed with the intent to defraud the Government of a valid tax imposed upon the same before the automobile in question is subject to forfeiture and that the mere finding of intoxicating liquor in the car, on which intoxicating liquor no tax has been paid, is not sufficient to justify forfeiture of the automobile."

to which refusal said claimant duly excepted and its exception was allowed. [115]

XVI.

The Court erred in refusing to give the jury claimant's requested instruction #10, reading as follows:

> "You are instructed that under the laws in force in the United States at the time the car in question was seized, it was unlawful for any person to manufacture or have in his possession intoxicating liquor and that there was no place at which any person manufacturing, selling or trafficking in intoxicating liquor could pay a tax on the same and there was no place where such liquor was required by law to be kept for the purpose of enabling the Internal Revenue Officers to inspect the same, collect taxes thereon and see that Internal Revenue Stamps were placed thereon."

to which refusal said claimant duly excepted and its exception was allowed.

XVII.

The Court erred in refusing to give the jury

claimant's requested instruction #11, reading as follows:

> "You are instructed that, in this case, the driver of the car at the time it was seized has been charged under the National Prohibition Act with the crime of transporting intoxicating liquor, that he has pleaded guilty to said charge and has been sentenced by this Court and that such action by the United States Government constitutes an election to proceed under the National Prohibition Act and said United States Government cannot now forfeit the automobile in question under the Internal Revenue laws, to wit, under Section 3450 United States Revised Statutes."

to which refusal said claimant duly excepted and its exception was allowed.

XVIII.

The Court erred in refusing to give the jury claimant's requested instruction #12½, reading as follows:

> "You are instructed that there is no presumption that the liquor found in the car at the time it was seized was being removed, deposited or concealed therein with intent to defraud the Government of any tax."

to which refusal said claimant duly excepted and its exception was allowed.

XIX.

The Court erred in refusing to give the jury claimant's requested instruction #14, reading as follows:

"You are instructed that the search-warrant issued to the United States Prohibition Agents was issued in aid of the enforcement of the United States Prohibition Act and not for the purpose of enabling the officers who seized the automobile in question to collect [116] taxes imposed under the Internal Revenue Act and that seizures made under such search-warrant cannot be the basis of an action to forfeit an automobile under the Internal Revenue Laws."

to which refusal said claimant duly excepted and its exception was allowed.

XIX.

The Court erred in refusing to give the jury claimant's requested instruction #15, reading as follows:

"You are instructed that under the National Prohibition Act the rights of innocent lienors or vendors who hold valid chattel mortgages or conditional sales contracts on an automobile used for the transportation of intoxicating liquor are protected. That the claimant in this case holds a valid conditional sales contract on the automobile in question. That there is a balance due said claimant in the sum of $794.08."

to which refusal said claimant duly excepted and its exception was allowed.

XX.

The Court erred in refusing to give the jury claimant's requested instruction #16, reading as follows:

> "You are instructed that the Internal Revenue Act, to wit, Section 3450, under which the United States Government is proceeding in this case, has been repealed by the National Prohibition Act in so far as it provides for the forfeiture of vehicles used for the transportation of intoxicating liquor."

to which refusal said claimant duly excepted and its exception was allowed.

XXI.

The Court erred in refusing to give the jury claimant's requested instruction #17, reading as follows:

> "You are instructed that the Internal Revenue Act under which the United States Government is proceeding in this case, to wit, Section 3450, United States Revised Statutes, has been repealed by the National Prohibition Act in so far as the same has any application to the rights of the Government to forfeit the automobile in question and that a forfeiture under said Act cannot be had in the present case."

to which refusal said claimant duly excepted and its exception was allowed.

XXII.

The Court erred in refusing to give the jury claimant's requested [117] instruction #20, reading as follows:

> "You are instructed that the words 'deposit or concealment,' as used in the information, mean deposit or concealment of an article at

a place other than the place where it is required by law to be kept for the purpose of enabling the United States Government to collect the tax thereon, and that unless the automobile in question was at the time being used for such purpose, said automobile cannot be forfeited in this action."

to which refusal said claimant duly excepted and its exception was allowed.

XXIII.

The Court erred in refusing to give the jury claimant's requested instruction #21, reading as follows:

"You are further instructed that, under the laws of the United States of America, in force at the time the automobile in question was seized, there was no place where the intoxicating liquor claimed by the Government to have been found in this car was required to be kept for the purpose of enabling the United States Government to collect a tax thereon and your verdict must therefore be for the claimant."

to which refusal said claimant duly excepted and its exception was allowed.

XXIV.

The Court erred in refusing to give the jury claimant's requested instruction #22, reading as follows:

"You are instructed that, in determining whether the automobile in question was being used for the deposit or concealment of a commodity on which a tax had been imposed with in-

> tent to defraud the government of such tax, you should determine whether the natural and probable consequences of the use to which the car was being put at the time alleged in the information would result in defrauding the government of a tax imposed upon the article alleged to have been concealed or deposited in the car and that unless you believe from the evidence that the government would have, in the ordinary course of events, collected a tax on such article if the article had not been deposited or concealed in the automobile, your verdict should be for the claimant and you should find the automobile not guilty."

to which refusal said claimant duly excepted and its exception was allowed.

XXV.

The Court erred in refusing to give the jury claimant's requested instruction #23, reading as follows:

> "In the present case, unless the acts done by the driver of the automobile in question resulted in depriving the Government of taxes, which, except for the doing of such acts the Government would, in all probability, have collected, the doing of such acts as were done in this case would not be any evidence of an intent to defraud the Government of the tax imposed upon the commodity alleged to have [118] been found in the automobile in question; that is, unless the completion of the acts alleged to have been done would result in depriving the

Government of a tax which it otherwise would collect, the mere doing of the acts would not be evidence of any intent to defraud the Government of such tax."

to which refusal said claimant duly excepted and its exception was allowed.

XXVI.

The Court erred in refusing to give the following instruction requested by the claimant:

"That if the doing of an act, when completed, would not result in a fraud, then the doing of the act would not be evidence of an intent to defraud."

and further erred in refusing to give the following instruction requested by the claimant:

"That if the doing of an act, when completed, would not result in defrauding the government out of any tax, then the doing of the act would not be evidence of an intent to defraud the Government of any such tax."

to which refusals the claimant then and there duly excepted and its exceptions were allowed.

XXVII.

The Court erred in signing and entering the decree herein upon the verdict of the jury.

WHEREFORE, claimant prays that the judgment and decree of the court be reversed, vacated and set aside and that the district court be directed to dismiss said cause, or, in the alternative, that a new trial be granted said claimant.

GRINSTEAD, LAUBE & LAUGHLIN and
THOMAS E. DAVIS,

Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 30, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [119]

---

* * * * * * * * *

ORDER GRANTING WRIT OF ERROR AND FIXING AMOUNT OF BOND.

This cause coming on to be heard in the courtroom of the above-entitled court in the city of Seattle, Washington, upon the petition of the claimant, Port Gardner Investment Company, a corporation herein filed, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors also herein filed in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and it is ORDERED that the amount of bond to be given by said plaintiffs be and the same is hereby fixed at Four Hundred Dollars ($400.00).

Dated this 30 day of Jan., 1925.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 30, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [120]

SUPERSEDEAS AND COST BOND.

KNOW ALL MEN BY THESE PRESENTS that Port Gardner Investment Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation, organized under and by virtue of the laws of the State of Maryland, authorized to become surety on bonds and undertakings required by the laws of the United States, as surety, are held and firmly bound unto the United States of America, in the sum of Four Hundred Dollars ($400.00), lawful money of the United States, to be paid to it or its successors or assigns, for which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our successors and assigns by these presents.

WHEREAS, the above-named Port Gardner Investment Company, a corporation, has prosecuted a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment of the District Court of the United States for the Western District of Washington, Northern Division, in the above-entitled cause;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Port

Gardner Investment Company, a corporation, shall prosecute its writ of error to effect, and answer all damages and costs, if they fail to make good their plea, and abide by and perform whatever decree which may be rendered by said United States Circuit Court of Appeals for the Ninth Circuit in said cause, or on the mandate of said Circuit Court of Appeals, by the court below, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said principal and surety have caused this instrument to be executed by their respective agents and attorneys thereunto duly authorized this 30th day of January, 1925.

PORT GARDNER INVESTMENT COMPANY.

By GRINSTEAD, LAUBE & LAUGHLIN and THOMAS E. DAVIS.

Its Attorneys.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Seal] By HARRY C. MILLER,

Atty.-in-fact. [121]

The within bond is approved, both as to sufficiency and form, this 30 day of January, 1925.

EDWARD E. CUSHMAN,

Judge.

O. K.—J. W. HOAR,

Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Jan. 30, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [122]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To Ed. M. Lakin, Clerk of the Above-entitled Court:

For a review of this cause on a writ of error sued out by the claimant herein, please prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit a complete transcript of the record herein, including the following (omitting all captions except that of the citation and writ of error):

1. Libel of information.
2. Answer of claimant.
3. Claim of claimant.
4. Instructions requested by claimant.
5. Verdict.
6. Decree.
7. Stipulation extending time for preparing and serving bill of exceptions.
8. Order extending time for preparing and serving bill of exceptions.
9. Bill of exceptions.
10. All exhibits introduced in evidence by either party.
11. Assignment of errors.
12. Petition for order allowing writ of error and fixing amount of bond.
13. Order granting writ of error and fixing amount of bond.

14. Bond.
15. Writ of error.
16. Citation.
17. This praecipe.

—and with said transcript transmit the original writ of error, the original citation.

GRINSTEAD, LAUBE & LAUGHLIN and
THOMAS E. DAVIS,

Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 30, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [123]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 303, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on writ of error to the said United States Circuit Court

of Appeals for the Ninth Circuit from the United States District Court for the Western District of Washington.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of counsel for claimant, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [124]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 303 folios at 15¢	$ 45.45
Certificate of Clerk to transcript of record, 4 folios at 15¢	.60
Seal to said certificate	.20
Total	$ 46.25

I hereby certify that the above cost for preparing and certifying record, amounting to $46.25 has been paid to me by counsel for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and citation on writ of error issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 16th day of February, 1925.

[Seal] ED. M. LAKIN,

Clerk of the United States District Court, Western District of Washington. [125]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 8861.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE JEWETT SEDAN AUTOMOBILE, Washington License #178080, Engine Number 44079, and Tools and Accessories, and LUTHER L. NEADEAU,

Libelees;

PORT GARDNER INVESTMENT COMPANY, a Corporation,

Claimant.

*   *   *   *   *   *   *   *   *

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, between United States of America, Libelant, One Jewett Sedan Automobile, Washington License #178080, Engine Number 44079, and Tools and Accessories, and Luther L. Neadeau, Libelees, and Port Gard-

ner Investment Company, a corporation, Claimant, a manifest error hath happened, to the great damage of said Port Gardner Investment Company, a corporation, as is said and appears by the petition herein, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings [126] aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at said place before the Justice aforesaid on the —— day of ——, 1925, that the record and proceedings aforesaid being inspected the said Justice of said Circuit Court of Appeals may cause further to be done therein to correct that error, what of the right and according to the law and custom of the United States should be done.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 30th day of January, in the year of our Lord one thousand nine hundred and twenty-five and of the Independence of the United States the one hundred and forty-ninth.

ED. M. LAKIN,

Clerk of said District Court of the United States, for the Western District of Washington.

The foregoing writ is hereby allowed.

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington.

Copy of within writ of error received and due service of same acknowledged this 30 day of Jan. A. D. 1925.

THOS. P. REVELLE,
J. W. HOAR,
Attorneys for Libelant.

Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 30, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [127]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 8861.

UNITED STATES OF AMERICA,

Libelant,

vs.

ONE JEWETT SEDAN AUTOMOBILE, Washington License #178080, Engine Number 44079, and Tools and Accessories, and LUTHER L. NEADEAU,

Libelees;

PORT GARDNER INVESTMENT COMPANY, a Corporation,

Claimant.

* * * * * * * * *

CITATION ON WRIT OF ERROR.

United States of America,—ss.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the term of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, on the 1st day of March, 1925, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein United States of America is libelant, One Jewett Automobile, Washington License #178080, Engine Number 44079, and Tools and Accessories, and Luther L. Neadeau, libelees, and Port Gardner Investment Company, a corporation, is claimant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated this 30th day of Jan., A. D. 1925.

EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington.

Service of foregoing and receipt of copy acknowledged and admitted this 30th day of January, 1925.

J. W. HOAR,
Atty. for Libelant.

Filed in the United States District Court, Western District of Washington, Northern Division.

Jan. 30, 1925. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [128]

[Endorsed]: No. 4501. United States Circuit Court of Appeals for the Ninth Circuit. Port Gardner Investment Company, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed February 20, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4501

United States Circuit Court of Appeals

For The Ninth Circuit

PORT GARDNER INVESTMENT COMPANY,
Plaintiff in Error,

—vs.—

UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE EDWARD E. CUSHMAN, *District Judge*

BRIEF OF PLAINTIFF IN ERROR

GRINSTEAD, LAUBE & LAUGHLIN,
THOMAS E. DAVIS,
Attorneys for Plaintiff in Error.
1408 Dexter Horton Building, Seattle, Washington

THE ARGUS PRESS, SEATTLE

No. 4501

United States Circuit Court of Appeals

For The Ninth Circuit

PORT GARDNER INVESTMENT COMPANY,
Plaintiff in Error,

—vs.—

UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE EDWARD E. CUSHMAN, *District Judge*

BRIEF OF PLAINTIFF IN ERROR

GRINSTEAD, LAUBE & LAUGHLIN,
THOMAS E. DAVIS,
Attorneys for Plaintiff in Error.
1408 Dexter Horton Building, Seattle, Washington

THE ARGUS PRESS, SEATTLE

United States Circuit Court of Appeals

For The Ninth Circuit

PORT GARDNER INVESTMENT COMPANY, *Plaintiff in Error,* —vs.— UNITED STATES OF AMERICA, *Defendant in Error.*	No. 4501

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE EDWARD E. CUSHMAN, *District Judge*

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

On March 15, 1924, W. S. Guy, automobile dealer, doing business in Everett, Washington, under the trade name of W. S. Guy Motor Sales, delivered One Jewett Sedan Automobile, engine No. 44079, to Luther L. Neadeau, a resident of Snohomish County, Washington, under a conditional sales contract.

The purchase price of said automobile was Sixteen Hundred Fifty Dollars ($1,650.00) plus in-

terest and cost of insurance. Six Hundred Fifty Dollars ($650.00) was paid in cash and the balance was to be paid in ten monthly installments of One Hundred Thirteen and 44/100 ($113.44) Dollars each.

The contract provided:

> "That the title and right of possession of said property shall remain in said vendor, its successors and assigns until the above specified payments, with interest, have been fully paid, then the title shall vest in the undersigned vendee."

The contract contained other provisions usually found in conditional sales agreements.

After the execution of the contract and the delivery of the car to the vendee, the vendor sold, assigned and transferred all of its interest in and to the contract, together with the property therein described, to the plaintiff in error, a finance company, engaged in the business, among other things, of discounting automobile paper (Record 89-95; Claimant's Exhibit B; Record 60-63).

On August 9, 1924, Luther L. Neadeau, the vendee, was arrested at his residence in Snohomish County by prohibition agents and the automobile was seized. Immediately prior to his arrest he drove into his yard in the automobile and the prohibition agents, who had previously searched his residence, saw a five-gallon keg containing distilled spirits, or moonshine liquor, in the tonneau of the

sedan, and placed him under arrest and seized the car (Record 31-34).

The liquor was plainly visible to the agents before they opened the car and before any arrest was made (Record 38).

Information was filed by the United States Attorney in the United States District Court, charging Neadeau, in count 1, with unlawful possession of intoxicating liquor and, in count 2, with transportation of intoxicating liquor. He pleaded guilty to both counts and was fined One Hundred Dollars ($100.00) on count 1 and One Hundred Fifty Dollars ($150.00) on count 2 (Record 56-59).

At the time of the seizure of the car there was a balance remaining unpaid on the purchase price to plaintiff in error of Seven Hundred Ninety-four and 8/100 ($794.08) Dollars, which amount is still unpaid (Record 62).

In the present action, the Government sought to forfeit the car under the provisions of Section 3450 United States Revised Statutes on the ground that at the time of the seizure it was being used in the removal and for the deposit and concealment of a large quantity of distilled spirits, to-wit: moonshine whiskey or distilled spirits, with intent to defraud the Government of the tax thereon. Said information stated that said distilled spirits were a commodity for which and in respect whereof a tax theretofore had been and then was imposed by the

laws of the United States, which tax had not been paid (Record 2).

To this information the plaintiff in error, having intervened, answered, denying the allegations of the information and filed a claim setting up its interest in the car as hereinbefore mentioned and alleged that neither it nor its assignor, the W. S. Guy Motor Sales, knew, or had any knowledge, prior to the time of the seizure, that the car was used or was intended to be used in any manner in violation of the laws of United States or of any state (Record 4-9).

The case was tried before a jury and, by a stipulation, the facts as to the interest of the plaintiff in error, the amount remaining unpaid and the innocence of the plaintiff in error and of its assignor, the vendor of the car, were admitted (Record 60-65).

Mr. Neadeau, the driver of the car, testified that he did not know that the liquor was subject to any tax and had no intent of defrauding the Government of any tax thereon and that the only purpose he had in having the liquor in his car was to take it home to drink (Record 64-65). The jury returned a verdict finding the car guilty, as charged in the information, and a decree of forfeiture was entered thereon.

ASSIGNMENT OF ERRORS

I

The District Court erred in sustaining an objection by the United States to the following question asked the witness W. M. Whitney by claimant on cross examination:

> "Mr. Whitney, the testimony of the United States officers up to the present time indicate that the liquor of which Exhibit 1 is a sample, was found in a 5-gallon keg in the rear of the automobile in question up near Monroe, Washington, on the 9th day of August, 1924? Will you tell the jury whether the fact that that liquor was in the car at the particular time in any way deprived the Government of any tax which it could have collected, or would have collected if the liquor had been anywhere else in the State of Washington at the time this seizure was made."

to which ruling of the court claimant then and there duly excepted and its exception was allowed.

II

The court erred in sustaining the libelant's objection to the following question asked the witness, L. L. Neadeau, a witness on behalf of plaintiff:

> "In case this automobile should be forfeited to the United States Government, would you be able to pay the Port Gardner Investment Company the balance due?"

to which ruling the claimant then and there duly excepted and its exception was allowed.

III

The court erred in instructing the jury as follows:

> "Under such circumstances as those alleged in this case, which is a violation of the Internal Revenue Act, the law is that if the party claiming the car, as this claimant here alleges, or it alleges, rather, that this car was sold on a conditional sales contract, and that part of it was paid for, and part was not paid for, and that the title to the car remained in the seller, and that the seller assigned the contract to the present claimant, and that neither of these parties had any idea that the car was going to be used in the illicit handling of liquor.
>
> "These allegations the court instructs you to disregard for the law is, under this statute, that if the seller of a car by selling it and delivering its possession into the custody of the buyer, the seller trusts him, he allows him to use the car. The Government has no hand in it; the Government is innocent entirely of these dealings between these parties. The seller by delivering the car over to the buyer puts him in possession to use it as he pleases, legally or illegally, and if he uses it to violate this statute, the car is guilty, and both the

> buyer and the seller lose all rights in the car by that forfeiture."

to which instruction the claimant at the time duly excepted and its exception was allowed.

IV

The court erred in instructing the jury as follows:

> "Now, regarding the internal revenue. The Government is kept up and its expenses paid by taxes not only placed on certain commodities and merchandise and articles that are brought into the United States from the outside which are called customs, but part of that revenue is derived from taxes placed on articles or merchandise or commodities produced in the country. Among these articles that are so taxed internally, that is that were produced in the country, are intoxicating liquors and distilled spirits.
>
> "Now, where a wholesaler places five wine gallons or more of distilled spirits in a keg or other container, it is his duty to place on that a stamp as evidencing the payment of the internal revenue on the liquor, and it must be so placed by him on such container before he sends it out from his establishment.
>
> "You have a right to take into account what the court has told you regarding the law, this matter of payment of taxes on liquor and the method that would be used to show that that

tax was paid, and what the evidence has shown in this case regarding that keg which has been testified to as having been found in the car, in determining whether in fact the tax due on this liquor had been paid.

"The court instructs as a matter of law that such liquor was and is liable to a tax, so you need not concern yourself with that fact. The court instructs you that as a matter of law. That is, such liquor as has been testified in this case this is. But that leaves for you to determine the question of fact about whether that tax has been paid. So you will not only take into account what the court has told you regarding the law, but what the evidence has shown regarding what, if any, stamps were on this keg, and what the evidence has shown regarding whether any tax has been paid, as shown by the books to have been paid in to this internal revenue district."

to which instruction the claimant at the time duly excepted and its exception was allowed.

V

The court erred in instructing the jury as follows:

"If you find by a fair preponderance of the evidence that the tax had not been paid on this liquor, it would then be your duty to consider next whether this liquor was deposited or concealed in this car. Now, the words 'deposit

and conceal' as used in this information and these instructions, mean what you ordinarily understand to be meant by those words. It is not necessary for you to find that the liquor had been both deposited and concealed in this case, but if it was deposited there, as alleged in the information, so far as that point is concerned, you would be warranted in returning a verdict of guilty, even though there had been no fair preponderance of the evidence that it was concealed in it. If you are, in addition to what I have told you, satisfied by a fair preponderance of the evidence that the liquor was either deposited or concealed in the car, as alleged in the information, you would then proceed to consider whether a fair preponderance of the evidence showed that it had been deposited or concealed in the car with the intent to defraud the United States out of the taxes due on the liquor.

"Now, fraud is not presumed unless there is evidence to support it. But every man is presumed to intend the ordinary and natural consequences of his voluntary acts. That is, he is presumed to intend what would ordinarily and naturally follow the things that he voluntarily does in the absence of some explanation negativing that presumption. And if the ordinary and natural result of the liquor being there placed in the car or concealed in the car and handled in the manner

that the evidence may have shown it to have been handled in this case, would in the absence of a discovery by the internal revenue officers, have resulted in the Government being defrauded out of that tax due on this liquor, then the car being used by the authority of the owner, that is, with his consent, not necessarily his authority to use the car wrongfully, but authority to use it, it would be presumed that it was the intent to defraud the Government out of its tax, and the car would be guilty. That is, if this presumption was not negatived or overcome by evidence showing that the party was innocent of any such intention."

to which instruction the claimant at the time duly excepted and its exception was allowed.

VI

The court erred in instructing the jury as follows:

"In connection with this matter of intent to defraud the Government, the court calls attention to the fact that Mr. Mooring testified that Mr. Neadeau told him this was moonshine liquor. Now, Mr. Whitney's testimony was that this expression 'moonshine liquor' meant illicit liquor, that is, the very controlling purposes for which it is made would be to avoid the law and the revenues imposed upon it by law. If you give credit to that testimony of Mr. Mooring's—

MR. HOAR: Mr. Simmons, I believe, Your Honor.

THE COURT: Mr. Simmons. I am confusing Mr. Simmons with Mr. Mooring who was a witness in the prior case. You would take that into account in determining whether Mr. Neadeau intended to defraud the Government out of any tax that was due on the liquor."

to which instruction the claimant at the time duly excepted and its exception was allowed.

VII

The court erred in instructing the jury as follows:

"But the court instructs you as far as this case is concerned that the law is that it is the party trusted with the car that abuses it in its case. If you picked up somebody, a neighbor, and was hauling him in your car and he took a bottle out of his pocket and to your knowledge put it in the pocket of the car, and you went your way with it concealed in the pocket of the car, your car might go, and very likely would if it were found out, the other elements of this offense being established. But if he, without your knowledge, while you were driving your car, slipped it under the seat of your car, and you went your way, your car would not be forfeited, because while you have trusted him to ride, you have not trusted him with your car; you have not let him control

your car to the prejudice of the Government." to which instruction the claimant at the time duly excepted and its exception was allowed.

VIII

The court erred in instructing the jury as follows:

> "Now, there was a customs officer on the stand yesterday who explained to you that if liquor was brought into the United States from Canada that the practice was that the customs officer would have the internal revenue officer place stamps on the imported liquor. There is no direct evidence in this case that this was imported liquor. This evidence was put in by the Government in an effort to prove a negative, that is, establish that this liquor was subject to a tax no matter where it came from.
>
> "Now, when intoxicating liquor is imported into the United States, at least in casks and kegs, the officers of the customs themselves put a stamp on the container as evidencing the payment of customs duties, and this stamp is cancelled by marks across it that extend not only across the stamp but on the wood on either side of the stamp, certain black lines, and then so that it may not be removed and used again not only is it immediately cancelled and scratched up so as to destroy it, but they varnish it over, the stamp and the wood, to ren-

der it still further difficult to work any fraud on the customs.

"You have heard the evidence from this customs officer regarding what that officer would probably do, to show that the internal revenue was paid for the liquor in such a container. So the liquor would be not only subject to a duty coming into the United States from the outside, but as soon as it reached the United States it would be subject also to this internal revenue tax that the witness described to you. That is, that is the evidence of this witness. The court is not instructing you to effect as a matter of law, but simply calling your attention to what the witness testified to."

to which instruction the claimant at the time duly excepted and its exception was allowed.

IX

The court erred in refusing to give the jury claimant's requested instruction No. 1, reading as follows:

"Members of the jury, you are instructed to find in favor of the claimant and against the libelant."

to which refusal said claimant duly excepted and its exception was allowed.

X

The court erred in refusing to give the jury claimant's requested instruction No. 3, reading as follows:

"You are instructed that the so-called tax

imposed on intoxicating liquors by the Revenue Laws and Tariff Laws of the United States are penalties and not taxes in the sense that the word 'taxes' is used in Section 3450 of the United States Revised Statutes and that before a tax, so-called, or penalty, shall be assessed against or collected from any person on account of responsibility for the manufacture or sale of intoxicating liquor, the evidence must first be produced of the illegal manufacture or sale of such intoxicating liquor and a hearing had upon the question of such illegal manufacture or sale."

to which refusal said claimant duly excepted and its exception was allowed.

XI

The court erred in refusing to give the jury claimant's requested instruction No 4, reading as follows:

"You are instructed that in this case there is no evidence that there was any hearing had or evidence given of the illegal manufacture or sale of any intoxicating liquor in controversy in this case prior to the time the automobile in question was seized by the Government."

to which refusal said claimant duly excepted and its exception was allowed.

XII

The court erred in refusing to give the jury

claimant's requested instruction No. 5, reading as follows:

> "You are instructed that in the absence of a hearing and evidence prior to the time of the seizure of the car to determine that the person manufacturing, selling or trafficking in intoxicating liquor found in the car should have a tax assessed against him, said car was not subject to forfeiture."

to which refusal said claimant duly excepted and its exception was allowed.

XIII

The court erred in refusing to give the jury claimant's requested instruction No. 6, reading as follows:

> "You are instructed that in no event can a tax imposed on intoxicating liquor be enforced by forfeiture of an automobile in which the intoxicating liquor was found, but that if such tax is collectible from anyone, it is collectible only from the person who manufactured, sold or trafficked in such intoxicating liquor."

to which refusal said claimant duly excepted and its exception was allowed.

XIV

The court erred in refusing to give the jury claimant's requested instruction No. 8, reading as follows:

> "You are instructed that the words 'removal,

> deposit or concealment' as used in the information mean removal, deposit or concealment from a place where the commodity is required by law to be kept so that the Government may there inspect it and collect the tax thereon, such as a distillery, a bonded warehouse, or other place where intoxicating liquor is required by law to be kept until the tax thereon has been paid."

to which refusal said claimant duly excepted and its exception was allowed.

XV

The court erred in refusing to give the jury claimant's requested instruction No. 9, reading as follows:

> "You are instructed that the burden is upon the United States Government to show that the intoxicating liquor was being removed, deposited or concealed with the intent to defraud the Government of a valid tax imposed upon the same before the automobile in question is subject to forfeiture and that the mere finding of intoxicating liquor in the car, on which intoxicating liquor no tax has been paid, is not sufficient to justify forfeiture of the automobile."

to which refusal said claimant duly excepted and its exception was allowed.

XVI

The court erred in refusing to give the jury

claimant's requested instruction No. 10, reading as follows:

> "You are instructed that under the laws in force in the United States at the time the car in question was seized, it was unlawful for any person to manufacture or have in his possession intoxicating liquor and that there was no place at which any person manufacturing, selling or trafficking in intoxicating liquor could pay a tax on the same and there was no place where such liquor was required by law to be kept for the purpose of enabling the Internal Revenue Officers to inspect the same, collect taxes thereon and see that Internal Revenue Stamps were placed thereon."

to which refusal said claimant duly excepted and its exception was allowed.

XVII

The court erred in refusing to give the jury claimant's requested instruction No. 11, reading as follows:

> "You are instructed that, in this case, the driver of the car at the time it was seized has been charged under the National Prohibition Act with the crime of transporting intoxicating liquor, that he has pleaded guilty to said charge and has been sentenced by this court and that such action by the United States Government constitutes an election to proceed under the National Prohibition Act and said

> United States Government cannot now forfeit the automobile in question under the Internal Revenue Laws, to-wit, under Section 3450 United States Revised Statutes."

to which refusal said claimant duly excepted and its exception was allowed.

XVIII

The court erred in refusing to give the jury claimant's requested instruction No. 12½, reading as follows:

> "You are instructed that there is no presumption that the liquor found in the car at the time it was seized was being removed, deposited or concealed therein with intent to defraud the Government of any tax."

to which refusal said claimant duly excepted and its exception was allowed.

XIX

The court erred in refusing to give the jury claimant's requested instruction No. 14, reading as follows:

> "You are instructed that the search warrant issued to the United States Prohibition Agents was issued in aid of the enforcement of the United States Prohibition Act and not for the purpose of enabling the officers who seized the automobile in question to collect taxes imposed under the Internal Revenue Act and that seizure made under such search warrant cannot

> be the basis of an action to forfeit an automobile under the Internal Revenue Laws."

to which refusal said claimant duly excepted and its exception was allowed.

XX

The court erred in refusing to give the jury claimant's requested instruction No. 15, reading as follows:

> "You are instructed that under the National Prohibition Act the rights of innocent lienors or vendors who hold valid chattel mortgages or conditional sales contracts on an automobile used for the transportation of intoxicating liquor are protected. That the claimant in this case holds a valid conditional sale contract on the automobile in question. That there is a balance due said claimant in the sum of $794.08."

to which refusal said claimant duly excepted and its exception was allowed.

XXI

The court erred in refusing to give the jury claimant's requested instruction No. 16, reading as follows:

> "You are instructed that the Internal Revenue Act, to-wit, Section 3450, under which the United States Government is proceeding in this case, has been repealed by the National Prohibition Act insofar as it provides for the

forfeiture of vehicles used for the transportation of intoxicating liquor."

to which refusal said claimant duly excepted and its exception was allowed.

XXII

The court erred in refusing to give the jury claimant's requested instruction No. 17, reading as follows:

"You are instructed that the Internal Revenue Act under which the United States Government is proceeding in this case, to-wit, Section 3450, United States Revised Statutes, has been repealed by the National Prohibition Act insofar as the same has any application to the rights of the Government to forfeit the automobile in question and that a forfeiture under said Act cannot be had in the present case."

to which refusal said claimant duly excepted and its exception was allowed.

XXIII

The court erred in refusing to give the jury claimant's requested instruction No. 20, reading as follows:

"You are instructed that the words 'deposit or concealment', as used in the information, mean deposit or concealment of an article at a place other than the place where it is required by law to be kept for the purpose of enabling the United States Government to collect the

> tax thereon, and that unless the automobile in question was at the time being used for such purpose, said automobile cannot be forfeited in this action."

to which refusal said claimant duly excepted and its exception was allowed.

XXIV

The court erred in refusing to give the jury claimant's requested instruction No. 21, reading as follows:

> "You are further instructed that, under the laws of the United States of America, in force at the time the automobile in question was seized, there was no place where the intoxicating liquor claimed by the Government to have been found in this car was required to be kept for the purpose of enabling the United States Government to collect a tax thereon and your verdict must therefore be for the claimant."

to which refusal said claimant duly excepted and its exception was allowed.

XXV

The court erred in refusing to give the jury claimant's requested instruction No. 22, reading as follows:

> "You are instructed that, in determining whether the automobile in question was being used for the deposit or concealment of a commodity on which a tax had been imposed with

intent to defraud the Government of such tax, you should determine whether the natural and probable consequences of the use to which the car was being put at the time alleged in the information would result in defrauding the Government of a tax imposed upon the article alleged to have been concealed or deposited in the car and that unless you believe from the evidence that the Government would have, in the ordinary course of events, collected a tax on such article if the article had not been deposited or concealed in the automobile, your verdict should be for the claimant and you should find the automobile not guilty."

to which refusal said claimant duly excepted and its exception was allowed.

XXVI

The court erred in refusing to give the jury claimant's requested instruction No. 23, reading as follows:

"In the present case, unless the acts done by the driver of the automobile in question resulted in depriving the Government of taxes, which, except for the doing of such acts the Government would, in all probability, have collected, the doing of such acts as were done in this case would not be any evidence of an intent to defraud the Government of the tax imposed upon the commodity alleged to have been found in the automobile in question; that

> is, unless the completion of the acts alleged to have been done would result in depriving the Government of a tax which it otherwise would collect, the mere doing of the acts would not be evidence of any intent to defraud the Government of such tax."

to which refusal said claimant duly excepted and its exception was allowed.

XXVII

The court erred in refusing to give the following instruction requested by the claimant:

> "That if the doing of an act, when completed, would not result in a fraud, then the doing of the act would not be evidence of an intent to defraud."

and further erred in refusing to give the following instruction requested by the claimant:

> "That if the doing of an act, when completed, would not result in defrauding the Government out of any tax, then the doing of the act would not be evidence of an intent to defraud the Government of any such tax."

to which refusals the claimant then and there duly excepted and its exceptions were allowed.

XXVIII

The court erred in signing and entering the decree herein upon the verdict of the jury.

ARGUMENT

Plaintiff in error contends:

1. That the word "tax" as used in Section 3450 means tax for revenue purposes and that the so-called tax now imposed upon intoxicating liquors is a penalty to assist in the enforcement of prohibition laws and not a tax for revenue purposes.
2. That the driver of the car was under no duty to pay any tax, and there was, therefore, no violation of a duty which would form the basis of an intent to defraud the Government of the tax.
3. That the words: "removal," "deposit," or "concealment" as used in Section 3450 United States Revised Statutes, in so far as distilled spirits are concerned, mean removal from an authorized distillery warehouse or bonded warehouse and concealment or deposit of liquors so removed from such warehouse and have no application to liquors which have been manufactured in an illicit distillery or which have never been in a place where the same could be legally kept without the tax thereon being paid.
4. That in a bone-dry state, such as the State of Washington, no one can obtain a permit to manufacture or have in his possession such liquor as that involved in the present case, nor could anyone pay a tax thereon; that a tender of any so-called tax would not be accepted but would result in the arrest of the person tendering it and that, regardless of where the liquor happened to be, the Government would not derive any tax or

revenue therefrom, and, consequently, the act of the driver of the car in placing the liquor in the car or transporting the liquor could not result in depriving the Government of any tax which it otherwise would have collected or in defrauding the Government of such tax.

5. That the evidence in this case shows nothing more nor less than transportation of liquor and that the law applicable to the case is Section 26 of the National Prohibition Act, in which case, plaintiff in error, the innocent vendor, holding a valid conditional sales contract, is entitled to protection.
6. That the driver of the car, having been prosecuted under the National Prohibition Act for the transportation of liquor and having pleaded guilty to such charge, it became the duty of the Government to proceed against the car under the provisions of Section 26 of the National Prohibition Act and that such prosecution is a bar to any proceeding under the Revenue laws.
7. That, if Section 3450, Revised Statutes, was ever intended to cover a case where the evidence showed transportation only and not removal from a distillery warehouse or bonded warehouse, it was repealed, to that extent, by the National Prohibition Act and was not re-enacted by the supplemental act of November 23, 1921.
8. That an intent to defraud the Government of taxes cannot be presumed from acts being done

unless the completion of the acts, undiscovered, would result in depriving the Government of taxes which, except for the discovery, it would have, in the ordinary course of events, collected.

9. That no presumption arises, in view of the present National and State laws prohibiting the manufacture or possession of intoxicating liquor, that one having moonshine liquor in his possession has an intent to defraud the Government of taxes.

Liquor Not Subject to Tax

1. The liquor seized was not subject to any tax as that word is used in Section 3450. At the time Section 3450 was enacted by Congress in 1866, intoxicating liquors and all other commodities on which taxes were levied or imposed, were being lawfully manufactured and produced in the United States and the only purpose in levying or imposing taxes thereon was to raise revenues for the support of the Government and not to prohibit the manufacture or traffic in such articles.

Since the passage of the Eighteenth Amendment and the National Prohibition Act and the Bone Dry Law of the States of Washington, it is illegal for anyone, especially in the State of Washington, to manufacture, sell or have in his possession, intoxicating liquors, and there is no legal way whereby anyone can, either by paying tax thereon, or otherwise, acquire the right to have or deal in such an article. The whole policy of the law, both State

and National is, not to raise revenue by taxation from such a commodity, but to prohibit the same, and any so-called tax now imposed thereon is a penalty and not a tax.

Regal Drug Corporation v. Wardell, 260 U. S. 386, 43 S. Ct. 152, 67 L. Ed. 318;

Lipke v. Lederer, 259 U. S. 557-561; 42 S. Ct. 459-551; 66 L. Ed. 1061;

Sullivan v. Felix, 233 U. S. 318-324;

Dukich v. Blair, 3 Fed. (2nd) 302;

Fontenot v. Accardo, 278 Fed. 871;

U. S. v. 2615 barrels of beer, 1 Fed. (2nd) 500;

U. S. v. One Haynes Automobile (C. C. A. 5th Circuit) 274 Fed. 926;

Commercial Credit Co. v. U. S., (C.C.A.-6th Circuit not yet reported) (See appendix).

Driver of Automobile Under No Duty to Pay Tax

In the case of *Commercial Credit Company v. U. S.* (C. C. A. 6th Circuit, decided April 6th, 1925, and not yet reported) (see Appendix), the court, speaking through Circuit Judge Denison, held that there was no duty on any person, transporting or having in his possession intoxicating liquor, to pay a tax on the same if the liquor has once been removed from an authorized distillery warehouse or bonded warehouse and that one transporting moonshine liquor, where there is nothing to indicate that he is the distiller or acting for the distiller, is under

no duty to pay any tax. In denying the right of the Government to forfeit an automobile under Section 3450, where the driver was transporting moonshine whiskey, the court said:

> "The claimant's contention is that at the time Sec. 3450 was enacted, as well as when it was re-enacted in the Revised Statutes, the Internal Revenue system contemplated a place of manufacture or of storage, and a tax which was payable as a condition of storage at or of removal from that place, and hence that a proper construction of the act reaches only a removal from that place, leaving the tax unpaid. It is then said that by such removal (or deposit or concealment) by the person charged with the duty of paying the tax, the offense is completed, and it does not again arise upon a subsequent transportation by someone else in the way naturally incident to the sale of any commodity. The article here transported is said to have been moonshine whiskey, but there is nothing to indicate that the transporters were distillers, or acting for the distillers. The natural inference, the one which we accept for the purposes of the case, is that they had bought this whiskey, mediately or immediately, from the distillers and were transporting it in connection with a resale. It must also be inferred that they knew or had reason to know that no tax had been paid.
>
> "The duty of the distillers (before 1920)

was to deposit this liquor in their bonded warehouse (after temporary storage in the receiving cistern, R. S. 3267), and to pay the tax before removal therefrom (Sundry Stats., *e. g.*, U.S. C. S. Secs. 5986 and 6028c). If in violation of law they took it elsewhere from the still, the per-gallon tax was to be assessed by the Commissioner upon the distillers (R. S. Sec. 3253), who were made personally liable. *Those who merely transport, after one removal, are seemingly under no duty to pay the tax. We find no statute imposing that duty. It does not seem to be a strong or violent inference, properly supporting a presumption of law, that one who is not in collusion with or aiding the defaulting taxpayer and who merely transports for his own purposes the non-tax paid article, is thereby guilty of intent to defraud the Government out of the tax.* If there were continuing liens upon the liquor itself for the tax, the inference might be stronger, but we find no statute creating such a lien. The lien is given against the distillery. True, the tax 'attaches' to the liquor when made, but this, without more, indicates rather a perfected, though unmatured, duty by the distiller to pay, rather than an enforcible lien. * * *

"Were it assumed that the distiller of moonshine wished to pay the per-gallon tax thereon, whatever the amount might be, $2.20 or $6.40, he would have difficulty enough in doing

so, though possibly the implications of R. S. Sec. 3253 would point the way; but if the later purchaser of the same liquor wished to make this payment, would he be able to discover any way in which it could be done? If he could have done it under the old revenue laws, it would have been by the purchase of stamps and affixing them to the package, though he was not entitled to buy stamps and practically he could not have done this; but the National Prohibition Act, Sec. 35, after providing that the Act shall not relieve any one from paying any taxes imposed upon the manufacture of such liquor or the traffic in it—a provision obviously intended to retain some liability on the part of the manufacturer and trafficker, but reaching no one else—proceeds, 'no liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance * * *'. So far as we find there was in the old revenue laws no way of paying any per-gallon tax except to pay it by revenue stamps 'in advance' of the act which would make the liquor available for use; but now comes Sec. 35 and prohibits the issue of any revenue stamps or tax receipts in advance.

"*Unless we have in some respect misapprehended the system, we cannot find that the mere transporter of moonshine is under duty to pay a per-gallon tax, which duty would make it the necessary basis for his intent to defraud;*

and we must regard the provision of Sec. 35, abolishing and forbidding all advance payments through stamps and receipts, to be in 'direct conflict' with the old system of per-gallon taxation, and hence to repeal it pro tanto." (Italics ours)

Commercial Credit Co. v. U. S. (C. C. A. 6th Circuit; Not yet Reported) (see Appendix).

For the benefit of court and counsel we are attaching, as an appendix to this brief, the opinion in the above case as well as the opinion in the case of *United States of America v. One Ford Automobile, Motor No. 4776501, Alabama License No. 10978;* Garth Motor Company, Claimant, decided by the United States Circuit Court of Appeals for the Fifth Circuit, February 27th, 1925, and not yet reported.

These are the only cases which we have found decided by any Circuit Court of Appeals directly deciding the question involved in this case, and in both of these cases forfeiture was denied.

Removal, Deposit or Concealment

The car was not being used for the removal, deposit or concealment of liquor as those words are meant and used in Section 3450.

U. S. v. One Ford Automobile, 286 Fed. 204;
U. S. v. One Premier Automobile (C. C. A. 9th Circuit) 297 Fed. 1007;
U. S. v. One Studebaker, 298 Fed. 191;

U. S. v. One Kissel Touring Automobile, 289 Fed. 120.

In the case of *United States v. One Ford Automobile*, 268 Fed., 204, the court held that the word removal as used in Sec. 3450, statute meant removal from a distillery warehouse or bonded warehouse. This court followed that case and held that the words "removal," "deposit" or "concealment" as used in said statute, had reference to removal from particular specified places designated by law.

U. S. v. One Premier Automobile, 297 Fed. 1007.

See also

U. S. v. One Buick Automobile, 300 Fed. 584.

An examination of the United States Revised Statutes will clearly show that Section 3450 was intended to apply only to distilled spirits manufactured in an authorized distillery or removed from such distillery, warehouse or bonded warehouse.

Section 3279 expressly covers the conveyance of liquor from an illicit or unauthorized distillery or warehouse and provides, in part, as follows:

> "And every person who knowingly receives at, carries or conveys any distilled spirits to or from, any such distillery, rectifying establishment, warehouse, or store, or who knowingly carries and delivers any grain, molasses, or other raw material to any distillery on which such sign is not placed and kept, shall forfeit

all horses, carts, drays, wagons, or other vehicle or animal used in carrying or conveying such property aforesaid, and shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than six months."

Section 3280 provides that distillers shall not carry on business until the law is complied with, and Section 3281 provides for the forfeiture of all property connected with any such distillery and the interest of any person therein who has knowingly suffered or permitted the business of a distiller to be there carried on, or who has connived at the same. Section 3258 provides for the registering of stills and penalties for failing to register. Section 3259 provides for notice of intention to carry on business of distiller or rectifier and provides for penalties and failure so to do.

Other provisions of the United Statutes provide for punishment of all persons engaged in the illicit manufacture, possession or traffic in liquor manufactured in an illicit distillery.

It is significant that in Section 3279 the forfeiture provided is for carrying or conveying the property, while in Section 3450 the forfeiture provided is for removal, deposit or concealment with intent to defraud the government of taxes imposed. It is apparent that the word transportation as used in the National Prohibition Act is synonymous with "carrying or conveying" in Section 3279. Since, under the National Prohibition Act, the

right of an innocent party cannot be forfeited because an automobile is used in transportation of liquor, there is a clear conflict between that Section and Section 3279 and, therefore, Section 3279 has not been reenacted by the provisions of the supplemental act of November 23rd, 1923, which merely provides that such sections of the Revenue Act are continued in force as are not directly in conflict with the National Prohibition Act.

Act. of Nov. 23, 1921, Chap. 134, Sec. 5;
42 Stat. at L. 222, 223.

In the case of *United States v. One Buick Automobile*, 300 Fed. 584, 588, the court, after reviewing the various revenue statutes, states:

> "Seemingly, unless language be stretched beyond its reasonable signification, section 3450 ought not, rationally, to be applicable to a mere transporter or distributor of intoxicating liquor, the person responsible therefor in either event being unacquainted, or perhaps not definitely impressed with the thought or idea that there is a distilling or other tax payable upon the liquor and that the same is and remains unpaid."

See also

U. S. v. One Studebaker, 298 Fed. 191;
U. S. v. One Kissel Car, 289 Fed. 688;
U. S. v. One Buick Sedan, 1 Fed. New Series 997.

The statutes above referred to and various statutes passed for the prohibiting of the illicit

manufacture and sale of distilled spirits, clearly indicate that Congress did not consider 3450 to apply to any cases, in so far as distilled spirits are concerned, except those cases involving the removal of the commodity from a legal distillery or bonded warehouse or other place where the liquor could be legally kept until the tax thereon was paid.

In the State of Washington there is in effect what is commonly called the Bone Dry Law, making it unlawful for any person other than a regularly ordained clergyman, priest or rabbi, actually engaged in ministering to a religious congregation, to have in his possession any intoxicating liquor other than alcohol. Section 7328 Remington's Compiled Statutes, 1922.

As the court judicially knows, and as witnesses testified in the present case (Record 50) a permit will not be issued to manufacture liquor in a Bone Dry State such as the State of Washington, and there is no method whereby anyone can legally have in his possession such liquor as that involved in the present case and no method whereby anyone can pay the Government a tax thereon without subjecting himself to arrest and punishment. It is apparent that, whether the liquor which was found in the automobile in the present case was in that automobile or in any other place in the State of Washington, the Government would not have collected any tax thereon and no one could have paid a tax. The placing of the liquor in the automobile did not in any manner make it more difficult

for the Government to receive revenue from said liquor than if the same had not been placed in the car. It was not in a place that was under the supervision of the revenue officers before it was placed in the car, or at any other time, and, for the court to instruct the jury that there is any presumption that the liquor was deposited or concealed in the car with intent to defraud the Government was clearly erroneous.

In the case of *United States of America v. One Ford Coupe, etc., et al,* (C. C. A. 5th Circuit, not yet reported—see Appendix) the Government was seeking to forfeit a car because the same was used for the purpose of depositing or concealing therein liquor which had been illicitly distilled with intent to defraud the Government of its internal revenue. The claimant in that case, as here, held title under a conditional sales contract and had no knowledge or cause to suspect that the driver of the car was violating any law or would do so. The Government contended that the tax on intoxicating liquor, although manufacture thereof is prohibited by the National Prohibition Act, has never been repealed and if so, has been reinstated by the Act of November 30, 1921. The Government also contended that an automobile may be forfeited under Section 3450 when used for the deposit or concealment of liquor and that Section 26 of the National Prohibition Act is not in conflict because it applies only to the transportation or removal of liquor. The court, in holding that Section 26 of the Na-

tional Prohibition Act was directly in conflict with Section 3450 Revised Statutes in so far as the same provides for the forfeiture of a vehicle used for the depositing or concealment of intoxicating liquors, said:

> "It is also contended that an automobile may be forfeited according to the provisions of Sec. 3450 when used for the deposit or concealment of liquor illicitly distilled and intended for use as a beverage, with intent to defraud the United States of the tax thereon, and that Sec. 26 of the National Prohibition Act is not in conflict, because it only applies to an automobile used in the removal or transportation of liquor. Where a forfeiture occurs under Sec. 3450 the interest of an innocent owner or lien-holder is lost. *United States v. Mincey*, 254 Fed. 287; *Logan v. United States*, 260 Fed. 746; *Goldsmith-Grant Co. v. United States*, 254 U. S. 505; Whereas in cases falling under Sec. 26 of the National Prohibition Act the rights of innocent owners or lien-holders are preserved. The position now taken by the Government in this case is that the interest of an innocent owner or lien holder may be forfeited if the automobile is standing still, but that such interest is protected if the automobile is in motion. That view could easily result in manifest injustice; for under it, as an illustration, the interest of an innocent holder or a lien on an automobile could be

forfeited upon proof that while it was parked on a public street liquor was concealed in it by some one who had the intent to defraud the government of its internal revenue tax.

"Section 3450 is superseded by Sec. 26 of the National Prohibition Act insofar as there is a conflict between the two. *United States v. One Haynes Automobile*, 274 Fed. 926. The former section applies to any goods or commodities upon which a tax is imposed, whereas the latter deals only with intoxicating liquor. An automobile actively engaged in transporting goods is at least as well adapted to facilitate violations of the revenue law as is one which is used merely for the deposit or concealment of goods. If Sec. 3450, correctly construed, makes a distinction between an automobile standing still and one in motion, we are of opinion that Sec. 26 of the National Prohibition Act operates to supercede it insofar as the forfeiture of automobiles and other vehicles, and air and water craft, used in the handling of liquor, is concerned. The latter section deals with the subject of the unlawful possession as well as the unlawful transportation of intoxicating liquor. It prescribes such penalties on the subject with which it deals as were deemed adequate. Where the seizure is one within its terms the seizing officer has no option or election as to the forfeiture proceeding to be pursued, but is required to follow the

procedure prescribed in that section. Language used in that section indicates that the applicability of the forfeiture provision therein contained was not intended to be dependent upon the seized vehicle being actually engaged in transporting intoxicating liquor when the seizure was made. That the forfeiture provision therein contained was intended to be applicable when the seized vehicle, at the time of its seizure, was used as a means of possessing intoxicating liquor, whether such liquor was or was not then being actually transported, is indicated by the fact that that forfeiture provision is immediately associated with the provision contained in the second sentence of that section: 'Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof.' The just quoted language, in the connection in which it is used, is inconsistent with the existence of an intention to deal only with intoxicating liquors while being actually transported. It cannot well be inferred that an automobile which was seized while it was being used as a means of possessing intoxicating liquors as intended to be forfeitable otherwise than under the provision of Sec. 26 of the National Prohibition Act if the transaction

also involved the feature of concealing such liquor. A special forfeiture provision being applicable in the case of a vehicle used in possession of intoxicating liquor, in such case another forfeiture provision applicable generally to anything used, with intent to defraud the United States of a tax, for the deposit or concealment of the subject of the tax cannot be resorted to.

"The conclusion is that Congress, when it enacted the National Prohibition Act, considered the forfeiture provision of Sec. 3450, which failed to protect an innocent interest in the thing forfeited, too severe, and therefore provided a less drastic penalty which safeguards such interest."

The evidence in this case merely showed that the liquor which was found in the car was contained in a five gallon keg placed in the tonneau of the car. That it was clearly visible to the officers before opening the car and was in no wise concealed in the car. That the driver of the car had driven up to his residence in his car immediately before he was placed under arrest and that all of his acts showed nothing more nor less than transportation of intoxicating liquor as defined in Section 26 of the National Prohibition Act.

United States v. One Buick Automobile, 300 Fed. 584-586.

Prosecution Under National Prohibition Act Bars Present Action

The driver of the car was prosecuted for transportation of liquor and pleaded guilty (R. 55-59). The act for which he was prosecuted was the same act for which the car was seized and a prosecution under the National Prohibition Act bars the enforcement of any penalties under the Revenue act. By Section 26 of the National Prohibition Act it became the duty of the arresting officers to take possession of the car in which the liquor was transported or possessed and, upon such seizure by such arresting officers, it was incumbent upon the court to issue a show cause order why the car should not be forfeited.

U. S. v. One Ford Coupe (C. C. A. 5th Circuit), not yet reported, (see Appendix).

By Section 5 Chapter 134 of the Act of November 23, 1921, it is expressly provided that a conviction under the National Prohibition Act bars a prosecution under the Revenue Act. The driver of the car having been convicted under the National Prohibition Act, the car itself was, by Section 26 of the National Prohibition Act, likewise convicted and subject to forfeiture, unless good cause to the contrary should be shown. Such a conviction was a bar to the present action.

U. S. v. Forbes, 291 Fed. 138.

Section 3450 Repealed In So Far As It Was Ever Applicable to a Situation Such As Here Presented

The principal contention of the Government in cases such as the one at bar is that Section 3450 covers cases where the evidence shows nothing more than transportation of any kind of liquor in an automobile or other vehicle, or where liquor is found in the automobile or other vehicle, regardless of where the liquor came from or with what intent the same was placed therein, and that all that is necessary for it to show is that the liquor is in the car and that no tax thereon has been paid. The principal cases relied upon by the Government are the cases of *Goldsmith-Grant Company v. U. S.*, 254 U. S. 505, and *U. S. v. Stafoff*, 260 U. S. 477, 67 L. Ed. 358.

The case of *Goldsmith-Grant Company v. U. S.* was decided upon facts which occurred prior to the going into effect of the National Prohibition Act. The parties had stipulated that the automobile was, at the time it was seized, being used for the removal, deposit and concealment of intoxicating liquor upon which a tax had been imposed with intent to defraud the Government of the tax. The only question involved was whether the statute intended forfeiture of the interest of an innocent party in the automobile and, if so, whether such statute was constitutional. Under the stipulated facts in that case there was no question involved as to where the liquor had come from, whether it

was subject to a tax or what the intent of the driver of the car may have been and no question was raised as to whether the car was used in the removal or for the deposit or concealment of such liquor, all of the allegations of the Government on these questions were admitted.

In the case of *U. S. v. Stafoff*, 260 U. S. 477, 67 L. Ed. 358, Section 3450 was not before the Court. It considered only Revised Statutes, 3242, 3258, 3281 and 3282. The distinction between that case and the present case was squarely passed upon by the Circuit Court of Appeals for the Sixth Circuit in the case of *The Commercial Credit Company v. United States*, (Decided April 6, 1925, and not yet reported. See Appendix). The court said:

> "Another consideration tends to the same result. We pointed out in the *Lewis* case such a measure of inconsistency in the two statutes in their relative effect on the same act (though not direct conflict) as supported the inference of implied repeal of the third class. The 're-enactment' made by the Willis-Campbell Act, is not of all laws that may have been impliedly repealed by the National Prohibition Act, but only if 'all laws in regard to the manufacture and taxation of and traffic in intoxicating liquors' and 'penalties for violation of such laws.' Only by the broadest construction can Sec. 3450 be brought within this classification. It provides a penalty which within its

total scope may have incidental effect upon liquor taxation; but Sec. 3450 does not directly mention liquor taxation, and only with difficulty can it be said to be 'a law in regard to' that subject.

"May our conclusion that there is 'direct conflict' between the old revenue per-gallon system of taxation and the National Prohibition Act forbidding any advance tax stamps or receipts be said to be itself inconsistent with the *Stafoff* case? We think not. That case did not involve any per-gallon system of taxation and tax payment, even by distillers. It considered only R. S. Secs. 3242, 3258, 3281 and 3282. These sections forbade carrying on a distilling or rectifying business, except upon certain conditions precedent, paying special tax, giving bond and registering. The court found no 'direct conflict' between these sections and the National Prohibition Act. Obviously not. There is no 'direct conflict' between a provision prohibiting an act unless after condition performed and a provision prohibiting it entirely. There is substantial accord. There is only that inconsistency coming from the implied permission for one to do the act if willing to perform the condition. There is in the comparison of these sections a good illustration of that mere inconsistency which was enough to work repeal under Sec. 35, but not

enough to be the 'direct conflict' of the Wills-Campbell Act.

"Our conclusion is confirmed,—indeed sufficiently supported by,—a comparison of the rights of the parties under Sec. 26 and under Sec. 3450, as the latter is construed by the Government to reach mere transportation and as it has been interpreted in the *Goldsmith-Grant* case. With reference to the effect upon the same act of the one transporting, there is no difference to him between the two sections; under either he loses every right he has in the vehicle. It is otherwise with reference to the good faith mortgage, or title holder. Sec. 3450 says his rights shall be forfeited; Sec. 26 says they shall not. Could inconsistency be more clearly 'conflict,' or 'conflict' more surely 'direct'?

"The acts cannot be differentiated by imputing in one case an intent to defraud the revenue, and considering this element absent in the other case. It is the Government's necessary position that the intent to defraud of the tax is inherent in the mere transportation, and so is always present."

The same conclusion is reached by the United States Circuit Court of Appeals for the Fifth Circuit in the case of *The United States of America v. One Ford Coupe Automobile, Motor No. 4776501, Alabama License No. 10978;* Garth Motor Com-

pany, Claimant (Decided February 27, 1925, and not yet reported. See Appendix).

See also

United States v. One Buick Automobile, 1 Fed. (2nd) 997, 1000.

The principle laid down in the above cases was adopted by this court in *McDowell v. United States*, 286 Fed. 552, and *One Big Six Studebaker Automobile v. United States*, 289 Fed. 256.

In the *McDowell* case, 286 Fed. 552, this court used the following language:

> "While there is a conflict in the decisions upon the question for decision, we think the better reasoning is in accord with *United States v. One Haynes Automobile*, 274 Fed. 926, a case similar to the present one, where the Court of Appeals for the Fifth Circuit held that it was not to be assumed that Congress intended to provide 'for the forfeiture of vehicles under section 26 of the Volstead Act, with its provisions for preserving the rights of third persons and still leave them subject to be forfeited under the more drastic provisions of Revised Statutes, Par. 3450."

We have not taken up each assignment of error and discussed it separately for the reason that practically all of the questions raised are more or less interwoven and revolve around the one important question, namely, whether the interest or title of an innocent person in an automobile can be forfeited because moonshine liquor has been found in

the car. A decision of this question decides the real merits of the case. However, we respectfully submit that, in any event, a new trial should be granted because of instructions erroneously given by the court to the jury. Most of the errors assigned depend upon the conclusion arrived at by the court on the proposition already discussed. However, the court specifically instructed the jury that the very controlling purpose for which moonshine liquor is made would be to avoid the law and the revenue imposed upon it by law and that the jury should take that into account in attempting to determine if Mr. Neadeau was intending to defraud the Government of the tax due it under Section 3450 (Record 80).

It is apparent that since the passage of the Eighteenth Amendment, the National Prohibition Act and the Bone Dry Law of the State of Washington, the very controlling purpose of manufacturing or transporting moonshine is not, as stated by the court, to avoid revenues imposed upon it by law, because there is no other way by which anyone could obtain such liquor for consumption or sale except by manufacturing it illicitly and transporting it. Furthermore, the court, in this instruction, placed the driver of the automobile in the same position as the manufacturer of the liquor, where, under the evidence, there was no connection shown between him and a manufacturer of the liquor and his own testimony, uncontradicted, was that he had purchased the liquor along the highway (Record

69, 70). Even in the absence of such testimony, the presumption would be, as pointed out in the case of *Commercial Credit Company v. U. S., supra,* that there was no connection between him and the manufacturer and that he is a mere transporter of moonshine and under no duty to pay a tax and that in the absence of such duty, there is nothing on which the Government can base an intent to defraud.

The court refused to give claimant's requested instructions Nos. 22 and 23 (Record 23, 24 and 86) wherein plaintiff in error requested the court to instruct the jury in effect that unless the completion of the acts alleged to have been done would have resulted in defrauding the Government out of any tax, then the doing of the act would not be evidence of an attempt to defraud.

The court also refused to permit the witness Whitney to state whether the fact that the liquor was in the car at the particular time that the car was seized, in any way deprived the Government of any tax which it would have collected or could have collected if the liquor had been any place else in the State of Washington at the time seizure was made.

By the refusal to admit the above testimony and by the refusal to give the instructions above requested the court, in effect, permitted the jury to find that one might be guilty of intent to defraud the Government of a tax, even though the Government would not and could not have collected such tax regardless of any act of the offender. It is

respectfully submitted that such is not the law.

Regardless of the court's decision on the real merits of the case and upon the questions raised as to whether the jury could have, under the evidence in this case, found the car was subject to forfeiture, it is respectfully submitted that the plaintiff in error is entitled to a new trial on account of erroneous instructions given and refusal to give instructions requested.

Respectfully submitted,
GRINSTEAD, LAUBE & LAUGHLIN and
THOMAS E. DAVIS,
Attorneys for Plaintiff in Error.

APPENDIX

DECISIONS NOT YET REPORTED

April 6, 1925.

UNITED STATES CIRCUIT COURT OF APPEAL SIXTH CIRCUIT

THE COMMERCIAL CREDIT COMPANY, Plaintiff in Error, v. UNITED STATES, Defendant in Error.

Before DENISON, DONAHUE and MORGAN, Circuit Judges.

DENISON, Circuit Judge:

While an automobile was being used for the transportation of illicit whisky, the car and contents were seized by federal prohibition agents, acting under Sec. 26 of the National Prohibition Act. Those in charge of the car were prosecuted and convicted under that act, but not otherwise. Thereupon the United States brought a libel against the automobile, alleging the foregoing facts, and further that the whisky being transported was subject to a tax of $4.20 per gallon by the Revenue Act of 1918, and was being removed by means of the automobile with intent to defraud the United States of such tax, and praying that the automobile be condemned and confiscated, pursuant to Sec. 26 of the National Prohibition Act, and pursuant to R. S. Sec. 3450 (U. S. C. S., Sec. 6352). Thereupon there issued to the marshal a warrant of seizure and a monition. In response thereto the Commercial Credit Company, as intervening claimant, answered, showing that it was the good-faith owner of a duly recorded purchase-money chattel mortgage upon the automobile, and that neither it nor its assignor, the original vendor, had any knowledge or any reason to suspect that the automobile would be used, or was being used, for any unlawful purpose. Thereupon it prayed recognition of its lien for the unpaid balance. Upon the hearing, the facts alleged in the intervening petition were admitted, but the court held that Sec. 3450 was applicable, and entered the judgment of condemnation, review of which is here sought.

The case presents three substantial questions, measurably but not wholly distinct. The first is whether such transportation as here occurred, if it had been before the passage

of the National Prohibition Act, would have been that "removal" which Sec. 3450 denounces. The second is on the assumption that the first is answered in the affirmative, and is as to the status in which such transportation has now been put by the passage of the National Prohibiion Act and the Willis-Campbell Act. The third assumes that the right of condemnation under Sec. 3450 would otherwise exist, and is as to the effect of the Government's action in seizing under Sec. 26 and prosecuting and convicting under that section the persons transporting. These questions have given rise to a great variety of opinion. These decisions, so far as we observe them, are cited and collected in the margin. [1] Before discussing these questions we may well notice that the Government's theory will carry condemnation very far. If the theory is correct, every automobile in which any quantity of non-tax paid liquor has been carried is absolutely forfeit, regardless of the participation, guilty knowledge or even negligence of the title or lien holder. All title and liens upon this kind of property become unstable and unsafe. As to the first and second questions our initial attention will be challenged by testing the affirmative theory on an extreme case, but one short of which it seemingly cannot stop. If the automobile driver is carrying in his pocket for the purpose of sale one unstamped half-ounce package of morphine, on which the unpaid stamp tax is one cent, is the automobile to be totally condemned?

Coming to the first: It is to be noted that while Sec. 3450 says "removed, deposited or concealed," the libel in this case charges only 'removal' and does not charge "deposit or concealment." Hence we are not directly called upon to consider this phrase "deposit or concealment." (a) The claimant's contention is that at the time Sec. 3450 was enacted, as well as when it was re-enacted in the Revised Statutes, the Internal Revenue system contemplated a place of manufacture or of storage, and a tax which was payable as a condition of storage at or of removal from that place, and hence that a proper construction of the act reaches only a removal from that place, leaving the tax unpaid. It is then said that by such removal (or deposit or concealment) by the person charged with the duty of paying the tax, the offense is completed, and it does not again arise upon a subsequent transportation by someone else in the way naturally incident to the sale of any commodity. The article here transported is said to have been moonshine whiskey, but there is nothing to indicate that the transporters were distillers, or acting for the distillers. The natural inference, the one which we accept for the purposes of the case, is that they had bought this whiskey, mediately or immediately, from the distillers and were transporting it in connection with a resale. It must

also be inferred that they knew or had reason to know that no tax had been paid.

The duty of the distillers (before 1920) was to deposit this liquor in their bonded warehouse (after temporary storage in the receiving cistern, R. S. 3267) and to pay the tax before removal therefrom. Sundry Stats., e.g., U.S.C.S. Secs. 5986 and 6028c.) If in violation of law they took it elsewhere from the still, the per-gallon tax was to be assessed by the Commissioner upon the distillers (R. S. Sec. 3253), who were made personally liable. Those who merely transport, after one removal, are seemingly under no duty to pay the tax. We find no statute imposing that duty. It does not seem to be a strong or violent inference, properly supporting a presumption of law, that one who is not in collusion with or aiding the defaulting taxpayer and who merely transports for his own purposes the non-tax paid article, is thereby guilty of intent to defraud the Government out of the tax. If there were continuing liens upon the liquor itself for the tax, the inference might be stronger, but we find no statute creating such a lien. The lien is given against the distillery. True, the tax "attaches" to the liquor when made, but this, without more, indicates rather a perfected, though unmatured, duty by the distiller to pay, rather than an enforceable lien.

(b) Further, "removed" and "transport" are not necessarily synonymous. The first more distinctly implies a taking away from an existing position and hence is particularly applicable to those cases where the paying of the tax is a condition of the right to change the article from a fixed to a transitory status.

We do not feel at liberty to follow out this first question to an independent conclusion. In the Goldsmith-Grant case (254 U. S. 505), the transporting in an automobile of non-tax paid liquor was under consideration. So far as the opinion shows the record did not indicate, any more than the present one does, that the persons transporting were distillers or in collusion with them. It is true that the argument, that mere transportation by a later owner is not the removal of Sec. 3450, was not considered in the opinion, if indeed it was presented; and it is true that for this reason the Supreme Court might well regard the question as not concluded by that opinion; but we think we must interpret it as obligatory upon us to its full, apparent extent, and as requiring us to answer in the affirmative the above stated first quetsion.

Coming to the second question: Assuming that the transportation here existing was "removal," within the original meaning of Sec. 3450, is the pertinent clause of that section now in force to the extent necessary to reach this particu-

lar transaction? It is obvious that the old revenue laws were repealed by the National Prohibition Act as to two classes of their provisions: First, those where there was repeal in terms; and second, those where the new provisions were so directly in conflict with the old that both could not stand together; and, although the second kind of repeal is called one by implication, it might well be called express. The term "implied repeal," covers also a third class, being those further cases where, although there is no direct conflict, the intent of the legislature, determined according to settled canons of construction, is inferred to the effect that the new provision was intended to supercede the old. In the Yuginovitch case (256 U. S. 450),—interpreting the decision in the aspect here important,—it was held that where the same act was an offense, both under the old law and the new, and where the new law provided therefor another and a lesser punishment or penalty, there was an implied repeal (of the above stated third class). Applying this decision we held in the Lewis case (280 Fed. 5), that in so far as Sec. 3450 might apply to the same transportation which was the subject of Sec. 26 of the National Prohibition Act, Sec. 3450 was no longer in force. We pointed out other considerations that led us to suggest a "direct conflict" between the pertinent aspect of Sec. 3450 and the National Prohibition Act, but we did not reach any conclusion thereon.

Then came the Willis-Campbell Act of November 23, 1921. As interpreted in Stafoff case (260 U. S. 477), this act recognized all repeals by implication (of the third class) then existing by the effect of the National Prohibition Act and the Yuginovitch case, and as to these old provisions, thus impliedly repealed, re-enacted them, making express, though seemingly unnecessary, declaration that existing repeals which were the result of "direct conflict" should remain undisturbed. Thus the Lewis case ceases to be continuing authority, but the question whether there is direct conflict between the National Prohibition Act and this part of Sec. 3450, or any other provision of the old law on which forfeiture by Sec. 3450 depends, remains open.

The question of "intent to defraud" as bearing on the meaning of "removal,"—that is, whose intent and when formed,—has been considered. We now observe that the intent must be to defraud the United States "of such tax," and this takes us to the opening clause referring to "goods or commodities for or in respect whereof any tax is imposed." Within the fair meaning of this clause, and as affected by the "direct conflict" aspect of the National Prohibition Act, was there, in 1924 any "tax imposed" upon the liquor being transported, so that the carriers could be guilty of the punishable intent? The power of Congress to

impose a tax upon that which it prohibits, is not to be questioned. The inquiry is, has Congress done so, by laws in force after November, 1921?

When we inquire about a tax the first thought is—"What tax?" In some of the cases it has been said that the tax authorized by Sec. 35 of the National Prohibition Act, answered this question; but, passing the difficulty of finding an intent to defraud the Government of a tax which does not exist, and the doubt whether this section has any reference to a per-gallon tax, it has been authoritatively held (Lipke v. Lederer, 259 U. S. 557, 561), that the assessment which may be made under this section is not of a tax, but of a penalty for law violation. So it must be quite clear that the requirement of Sec 3450 that there shall be an intent to defraud "of a tax" cannot be satisfied by finding no tax only a penalty. R. S. Sec. 3296 is in the same situation. It does not provide a precedent tax out of which one may intend to defraud the Government; it provides a penalty to be assessed as punishment for wrongdoing.

Apparently, previous statutes, like R. S. Sec. 3251, were superseded by Sec. 48 of the Act of August 27, 1894, (whether the lien and personal liability clauses of 3251 would survive is here immaterial). The Act of 1894 adopts and makes applicable the existing provisions of law for the payment of taxes by the use of stamps. This act levied a tax of $1.10 on each proof gallon; we do not find that it contemplated or permitted any means of collection, or payment, save through the system of selling of tax-paid stamps by the collector. It provided for payment by the distillee before removal. This statute in turn was partially superseded by Sec. 600 (a) of the Revenue Act of 1918 (40 Stats., 1105). This provides that in lieu of all other Internal Revenue Taxes:

"There shall be levied and collected on all distilled spirit * * * that may be hereafter produced in * * * the United States * * * a tax of $2.20 (or, if withdrawn, for beverage purposes or for use in manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon * * * to be paid by the distiller or importer when withdrawn, and collected under the provisions of the existing law."

When this act was passed the manufacture of whiskey for beverage purposes or its withdrawal from bond for such purposes was lawful, except as temporarily suspended by the War Prohibition Act. The evident theory was that at the time the distilled spirits were withdrawn from the distillery or bonded warehouse, they should be classified as for beverage, or for industrial, medicinal, etc., purposes, and the tax paid accordingly. It was at least difficult to apply this statute intelligently to "moonshine" whiskey, which never

reached the contemplated point of withdrawal or classification; but then we come to Sec. 600 of the Revenue Act of 1921, (40 Stats., 285). This amended the last quoted statute by adding thereto: "Provided, that on all distilled spirits on which a tax is paid at the nonbeverage rate of $2.20 per proof gallon and which are averted to beverage purposes or for use in manufacture or production of any article, used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon, * * * to be paid by the person responsible for such diversion."

Since the National Prohibition Act then forbade any diversion to beverage purposes or for use in an article intended for a beverage, here we have perhaps for the first time, the clear imposition by Congress of a per-gallon tax on the liquor involved in any forbidden transaction; but here, again, it seems most difficult to make application of the provision to moonshine liquor. Indeed the amendment of 1921 cannot refer to such liquor, since its effect is confined to spirits on which the nonbeverage tax has been paid, [2] and its apparent scope was limited to spirits which had been withdrawn for industrial or other lawful purposes and then were diverted; but even if it were otherwise applicable, we do not find in this record any charge that the persons who transported were the "persons responsible" for the diversion. In any effort to invoke this amendment of 1921, we must observe that this illicit liquor is diverted to beverage purposes the moment it is made as much as it ever is until its use as a beverage is finally accomplished; and it would hardly be thought that the ultimate consumer is the person intended to be taxed by the amendment of 1921, or that his act is "deposit or concealment" under R. S. Sec. 3450.

Were it assumed that the distiller of moonshine wished to pay the per-gallon tax thereon,—whatever the amount might be, $2.20 or $6.40,—he would have difficulty enough in doing so, though possibly the implication of R. S. Sec. 3253 would point the way; but if the later purchaser of the same liquor wished to make this payment, would he be able to discover any way in which it could be done? If he could have done it under the old revenue laws, it would have been by the purchase of stamps and affixing them to the package—though he was not entitled to buy stamps and practically he could not have done this; but the National Prohibition Act, Sec. 35, after providing that the Act shall not relieve any one from paying any taxes imposed upon the manufacture of such liquor or the traffic in it—a provision obviously intended to retain some liability on the part of the manufacturer and trafficker but reaching no one else—proceeds, "no liquor revenue stamps or tax receipts for any illegal manufacture or

sale shall be issued in advance. * * *." So far as we find there was in the old revenue laws no way of paying any per-gallon tax except to pay it by revenue stamps "in advance" of the act which would make the liquor available for use; but now comes Sec. 35 and prohibits the issue of any revenue stamps or tax receipts in advance.

Unless we have in some respect misapprehended the system, we cannot find that the mere transporter of moonshine is under duty to pay a per-gallon tax, which duty would make it the necessary basis for his intent to defraud; and we must regard the provision of Sec. 35, abolishing and forbidding all advance payments through stamps and receipts, to be in "direct conflict" with the old system of per-gallon taxation, and hence to repeal it pro tanto. [3]

We do not see that this liquor can be thought of as possibly produced for non-beverage purposes, and hence still subject to taxation on that theory. The system of producing non-beverage spirits is surrounded by careful safeguards; the law in that respect is to be enforced by the specified punishment for disregarding these safeguards, not by reference drawn from any fiction that illicit liquor is to be considered, for convenient purposes, as if lawful.

Another consideration tends to the same result. We pointed out in the Lewis case such a measure of inconsistency in the two statutes in their relative effect on the same act (though not direct conflict) as supported the inference of implied repeal of the third class. The "re-enactment" made by the Willis-Campbell Act, is not of all laws that may have been impliedly repealed by the National Prohibition Act, but only of "all laws in regard to the manufacture and taxation of and traffic in intoxicating liquors" and "penalties for violation of such laws." Only by the broadest construction can Sec. 3450 be brought within this classification. It provides a penalty which within its total scope may have incidental effect upon liquor taxation; but Sec. 3450 does not directly mention liquor taxation, and only with difficulty can it be said to be "a law in regard to" that subject.

May our conclusion that there is "direct conflict" between the old revenue per-gallon system of taxation and the National Prohibition Act forbidding any advance tax stamps or receipts be said to be itself inconsistent with the Stafoff case? We think not. That case did not involve any per-gallon system of taxation and tax payment, even by distillers. It considered only R. S. Secs. 3242, 3258, 3281 and 3282. These sections forbade carrying on a distilling or rectifying business, except upon certain conditions precedent—paying special tax, giving bond and registering. The court found no "direct conflict" between these sections and the National Prohibition Act. Obviously not. There is no "direct conflict" be-

tween a provision prohibiting an act unless after condition performed and a provision prohibiting it entirely. There is substantial accord. There is only that inconsistency coming from the implied permission for one to do the act if willing to perform the condition. There is in the comparison of these sections a good illustration of that mere inconsistency which was enough to work repeal under Sec. 35, but not enough to be the "direct conflict" of the Wills-Campbell Act.

Our conclusion is confirmed—indeed sufficiently supported by—a comparison of the rights of the parties under Sec. 26 and under Sec. 3450, as the latter is construed by the Government to reach mere transportation and as it has been interpreted in the Goldsmith-Grant case. With reference to the effect upon the same act of the one transporting, there is no difference to him between the two sections; under either he loses every right he has in the vehicle. It is otherwise with reference to the good faith mortgagee, or title holder. Sec. 3450 says his rights shall be forfeited; Sec. 26 says they shall not. Could inconsistency be more clearly "conflict," or "conflict" more surely "direct?"

The acts can not be differentiated by imputing in one case an intent to defraud the revenue, and considering this element absent in the other case. It is the Government's necessary position that the intent to defraud of the tax is inherent in the mere transportation, and so is always present.

The third question is whether there was a binding election by the Government to proceed under Sec. 26. In view of our determination upon the second question, an answer to the third becomes unnecessary.

The order of condemnation must be reversed and the case remanded for the entry of the order proper under Sec. 26.

1

As to "removal with intent, etc.," and "transportation."

U. S. v. One Ford Truck (D. C. Wash.), 286 Fed. 204.
U. S. v. One Kissel Car (D. C. Cal.), 289 Fed. 120; S. C. (C. C. A. 9), 296 Fed. 688.
U. S. v. Premier Auto (C. C. A. 9), 297 Fed. 1007.
U. S. v. Studebaker Auto (D. C. Tex.), 298 Fed. 191, 193.
U. S. v. One Cadillac Auto (D. C. Ill.), 292 Fed. 773, 775.
U. S. v. Mangano (C. C. A. 8), 299 Fed. 492.
U. S. v. One Buick Auto (D. C. Cal.), 300 Fed. 584.
U. S. v. One Buick Auto (D. C. Cal.), 1 Fed. (2nd) 997.
U. S. v. One Cadillac Auto (D. C. Tenn.), 2 Fed. (2nd) 886.

As to effect of Wills-Campbell Act upon 3450; and as to the existence of a "tax thereon" and "direct conflict."

U. S. v. One Hudson Car (D. C. Mich.), 274 Fed. 273.
One Ford Car v. U. S. (C. C. A. 8), 284 Fed. 823.
U. S. v. One Brewing Co. (D. C. Pa.), 296 Fed. 772, 774.
U. S. v. Deutsch (D. C. N. J.), not yet reported.
U. S. v. One Ford Coupe (C. C. A. 5), not yet reported.
U. S. v. One Haynes Auto (C. C. A. 5), 274 Fed. 926.
The Cherokee (D. C. Tex.), 292 Fed. 212.
U. S. v. One Bay State Roadster (D. C. Conn.), 2 Fed. (end), 666.
U. S. v. Sims (C. A. D. C.), March 2, 1925.
U. S. v. One Ford Auto, Morris Co., Intervener (D. C. Tenn.), 1 Fed. (2nd), 654.
U. S. v. One Ford Auto (D. C. Tenn.), 2 Fed. (2nd) 882.

As to election between Section 26 and R. S. 3450.

U. S. v. Torres (D. C. Md.), 291 Fed. 138.
U. S. v. One Ford Auto, Commercial Cr. Co., Intervenor (D. C. Tenn.), not yet reported.
U. S. v. 385 Bbls., etc. (D. C. N. Y.), 300 Fed. 565.

2

It might be said that since the petition charges only an intent to defraud out of the $4.20 tax, and since such tax can not attach to liquor not withdrawn for lawful purposes, there can be no condemnation under this petition.

3

Section 1300 of the Revenue Act of 1921 (40 Stats. 308), does not seem applicable. It "extends to this Act * * * stamp provisions of Law," but this Act impose no possible relevant tax except the $4.20 tax of 600 (a) which refers only to $2.20 tax-paid liquor nor do the "stamp provisions of law" seem possible of application to that tax.

February 27, 1925

UNITED STATES CIRCUT COURT OF APPEALS, FIFTH CIRCUIT

THE UNITED STATES OF AMERICA, Appellant, v. ONE FORD COUPE AUTOMOBILE, Motor No. 3776501, Alabama License No. 10978; GARTH MOTOR COMPANY, Claimant, Appellee.

BRYAN, Circuit Judge:

This is a libel of information under R. S. Sec. 3450, for the forfeiture of an automobile. The facts relied on by the Government are that one Killian had the automobile in his possession and was using it for the purpose of depositing or concealing therein liquor which had been illicitly distilled, with the intent to defraud the United States of its internal revenue tax. The claimant, Garth Motor Company, had sold the automobile, but had retained title until the purchase price should be paid, of which, at the time the libel was filed, there was an unpaid balance of $125. It had no knowledge or cause to suspect that Killian was violating any law or would do so. Indeed, the sale was innocently made to another person. The district court dismissed the libel.

The case is one at law, and should have been brought here for review by writ of error, instead of by appeal as was done; but that is unimportant, and we proceed to the merits. Act of Sept. 6, 1916, 39 Stat. 727.

Counsel for the Government make an elaborate and exhaustive argument to establish the proposition that the tax on intoxicating liquors, although the manufacture thereof is prohibited by the National Prohibition Act, has never been repealed, or if so, that it has been reinstated by Sec. 5 of the Act of Nov. 23, 1921, 42 Stat. 223, which provides "that all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act," etc. The proposition contended for finds support in the cases of United States v. Yuginovich, 256 U. S. 450, and United States v. Statoff, 260 U. S. 477, and may be conceded.

It is also contended that an automobile may be forfeited according to the provisions of Sec. 3450 when used for the deposit or concealment of liquor illicitly distilled and intended for use as a beverage, with intent to defraud the United States of the tax thereon, and that Sec. 26 of the

National Prohibition Act is not in conflict, because it only applies to an automobile used in the removal or transportation of liquor. Where a forfeiture occurs under Sec. 3450 the interest of an innocent owner or lien-holder is lost. United States v. Mincey. 254 Fed. 287; Logan v. United States, 260 Fed. 746; Goldsmith-Grant Co. v. United States, 254 U. S. 505; Whereas, in cases falling under Sec. 26 of the National Prohibition Act the rights of innocent owners or lien-holders are preserved. The position now taken by the Government in this case is that the interest of an innocent owner or lien-holder may be forfeited if the automobile is standing still, but that such interest is protected if the automobile is in motion. That view could easily result in manifest injustice; for under it, as an illustration, the interest of an innocent holder or a lien on an automobile could be forfeited upon proof that while it was parked on a public street liquor was concealed in it by some one who had the intent to defraud the government of its internal revenue tax.

Section 3450 is superseded by Sec. 26 of the National Prohibition Act insofar as there is a conflict between the two. United States v. One Haynes Automobile, 274 Fed. 926. The former section applies to any goods or commodities upon which a tax is imposed, whereas the latter deals only with intoxicating liquor. An automobile actively engaged in transporting goods is at least as well adapted to facilitate violations of the revenue law as is one which is used merely for the deposit or concealment of goods. If Sec. 3450, correctly construed, makes a distinction between an automobile standing still and one in motion, we are of opinion that Sec. 26 of the National Prohibition Act operates to supercede it insofar as the forfeiture of automobiles and other vehicles, and air and water craft, used in the handling of liquor, is concerned. The latter section deals with the subject of the unlawful possession as well as the unlawful transportation of intoxicating liquor. It prescribes such penalties on the subject with which it deals as were deemed adequate. Where the seizure is one within its terms the seizing officer has no option or election as to the forfeiture proceedings to be pursued, but is required to follow the procedure prescribed in that section. Language used in that section indicates that the applicability of the forfeiture provision therein contained was not intended to be dependent upon the seized vehicle being actually engaged in transporting intoxicating liquor when the seizure was made. That the forfeiture provision therein contained was intended to be applicable when the seized vehicle, at the time of its seizure, was used as a means of possessing intoxicating liquor, whether such liquor was or was not then being actually transported, is indicated by the fact that that forfeiture provision is immediately associated with the pro-

vision contained in the second sentence of that section: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof." The just quoted language, in the connection in which it is used, is inconsistent with the existence of an intention to deal only with intoxicating liquors while being actually transported. It cannot well be inferred that an automobile which was seized while it was being used as a means of possessing intoxicating liquors was intended to be forfeitable otherwise than under the provision of Sec. 26 of the National Prohibition Act if the transaction also involved the feature of concealing such liquor. A special forfeiture provision being applicable in the case of a vehicle used in possessing intoxicating liquor, in such case another forfeiture provision applicable generally to anything used, with intent to defraud the United States of a tax, for the deposit of concealment of the subject of the tax, cannot be resorted to.

The conclusion is that Congress, when it enacted the National Prohibition Act, considered the forfeiture provision of Sec. 3450, which failed to protect an innocent interest in the thing forfeited, too severe, and therefore provided a less drastic penalty which safeguards such interest.

The judgment is AFFIRMED.

In the

United States Circuit Court of Appeals

For the Ninth Circuit 7

No. 4501.

PORT GARDNER INVESTMENT COMPANY,
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, DISTRICT JUDGE

Brief of Defendant in Error

THOS. P. REVELLE
United States Attorney

J. W. HOAR
Assistant United States Attorney

Attorneys for Defendant in Error

310 Federal Building, Seattle, Washington

FILED
JUN 9 - 1925
F. D. MONCKTON
CL

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4501.

PORT GARDNER INVESTMENT COMPANY,
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE EDWARD E. CUSHMAN, DISTRICT JUDGE

Brief of Defendant in Error

STATEMENT OF THE CASE

In this case while officers were searching certain premises under a Federal Search Warrant, the owner drove on to the premises in his Jewett Sedan,

which containd a five-gallon keg of moonshine whiskey.

The car was seized and the driver pleaded guilty to the possession and transportation of intoxicating liquor.

From a judgment of the District Court condemning said car and ordering it to be sold, an appeal has been taken by the assignee of the vendor of said automobile under a Conditional Sales Contract, claiming to be innocent of any wrong doing, and entitled to protection to the extent of his claim.

ARGUMENT.

In his argument counsel for appellant has set forth the position of appellant as well as that of the Government when he says that the desire of both parties is to settle on principle and on the merits rather than on minor details, the real question of this seizure, viz: will the circumstances surrounding this sort of seizure justify an absolute forfeiture under Revised Statutes No. 3450 of the Internal Revenue Laws, or must the Government confine itself under such circumstances to the forfeiture provided in the National Prohibition Act?

Appellant first contends that the allegations contained in the libel do not state a ground or cause for

a forfeiture under R. S. 3450; and that he is entitled to the protection afforded an innocent claimant as provided for under Section 26, Title II of the National Prohibition Act.

Inasmuch as the Government is confronted with this question daily, and in view of the ever increasing number of automobiles being seized, it is greatly interested in having its authority and limitations determined in this class of seizures.

The decisions of the various courts are not in harmony on this question, and until it is disposed of by the Supreme Court it will be an open question.

Section 26, Title II of the National Prohibition Act, provides as follows:

"When the commissioner, his assistant, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle, team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. * * * * The court upon conviction of the person so arrested shall order the liquor destroyed,

and unless good cause is shown by the owner, shall order a sale by public auction of the property seized."

and then provides for allowance of claims of innocent claimants.

Section 3450 Revised Statutes, reads as follows:

"Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of, for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained such goods or commodities, respectively, and every vessel, boat, cart, carriage or other conveyance whatsoever and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

Section 35 of the National Prohibition Act provides as follows:

"All provisions of the law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein pro-

vided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve any one from criminal liability, nor shall this Act relieve any person from any liaiblity, civil or criminal, heretofore or hereafter incurred under existing laws."

Section 5 of the Act of November 23, 1891 (42 Stat. 222) known as the Willis Campbell Act, or Act supplemental to the National Prohibition Act, provides as follows:

"That all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in confiict with any provision of the National Prohibition Act or of

this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in Section 35, Title II, of the National Prohibition Act shall be assessed and collected in the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor."

Section 600 (a) (40 Stat. 1057) (Act of February 24, 1919), provides as follows:

"There shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in Section 604, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing laws."

Section 600, Title VI, Revenue Act of 1921 (Act of November 23, 1921) (42 Stat. 227) amending the last mentioned section, provides:

"That subdivision (a) of section 600 of the Revenue Act of 1918, is amended by striking out the period at the end thereof and inserting a colon and the following: 'Provided, That on all distilled spirits on which the tax is paid at the nonbeverage rate of $2.20 per proof gallon and which are diverted to beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, there shall be levied and collected an additional tax of $4.20 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon, to be paid by the person responsible for such diversion."

The actual enforcement of the National Prohibition Act had not been in progress very long until it was discovered that Section 26 of Title II of this Act, providing for the seizure and forfeiture of vehicles engaged in the illicit transportation of intoxicating liquor, was in its operation impracticable in many respects.

It permitted the owners of vehicles to so mortgage them or to transfer the titles thereto as to avoid forfeitures. It necessitated a conviction of a criminal charge before the forfeiture could be effected. This produced great delays with resultant accumulation of expensive storage charges while court action was being awaited. The long pending cases encumbered the dockets.

It was found that Section 3450 of the Revised Statutes was of a much more summary nature in that it did not afford opportunity for intervenors to come in and defeat the forfeiture and did not depend upon a criminal conviction, but effected prompt dispatch of cases brought thereunder and consequent relief of the dockets.

Therefore, the Government has been unwilling to concede that Section 3450 is no longer available for prohibition enforcement, but on the contrary has encouraged the use of it whenever possible, realizing, nevertheless, the nicety of the question.

There has been so many decisions upon both sides of this question that it is difficult to determine, without a careful examination of the authorities, where the weight of authority lies. The Government takes the view that there is very good reason for contending that Section 3450 is still in force. Whether or not Section 3450 has been superseded by the National Prohibition Act will of course be an open question until it is finally disposed of by the Supreme Court.

There can be no doubt about the power of the Government in the interests of the public revenue to condemn offending vehicles of transportation with-

out regard to the private rights and interests therein of the offending persons. This was definitely decided in the *Goldsmith-Grant Company* case, 254 U. S. 505.

This was a libel proceeding brought under Section 3450 for the forfeiture of an automobile used prior to the adoption of National Prohibition in the removal, deposit and concealment of nontaxpaid spirits. The vehicle was being operated by the purchaser. The Goldsmith Company intervened as owners under the terms of a conditional sale contract by which they had reserved title until completion of payment of the purchase price. They were in fact innocent of the unlawful use of the car and alleged that the taking of their property would be a violation of the Fifth Amendment.

But the Supreme Court held that Congress in enacting this statute treated the "*res*" as the offender and in providing so arbitrary a rule took into account the interest of the Government, its revenue and policies. This case was decisive as to the force and effect of Section 3450 in cases of removal and concealment of nontaxpaid intoxicating liquors. What it decided is so plain as to afford little excuse for argument. However, the probabilities are that the rule there promulgated

would not be applied in cases where the vehicle is operated by one who has stolen it, or is in possession of it without the express or implied consent of the owner. It should be borne in mind that this case arose before National Prohibition became effective, although it was decided after the adoption of the National Prohibition Act.

In this connection reference is made to the following decisions of similar import:

> *United States v. Mincey*, 254 Fed. 287, C. C. A., 5th—November 8, 1918.
>
> *United States v. One Saxon Automobile et al*, 257 Fed. 251, C. C. A., 4th—January 7th, 1919.
>
> *Logan v. United States—Wisdom et al v. United States*, 260 Fed. 746, C. C. A., 5th —October 15th, 1919.
>
> *United States v. One W. W. Shaw Automobile Taxi and certain whiskey*, 272 Fed. 491. District Court, Northern Ohio—May 20, 1921.

In the recent case of *United States v. One Studebaker 7-Passenger Sedan*, decided by this court on March 23, 1925, and unreported, it was held that a vehicle can be forfeited for the removal of a commodity upon which an internal revenue tax was

imposed with intent to defraud the United States of such tax.

It was not long after the National Prohibition Act became operative that the question arose whether the case continued to furnish a rule as to transportation on nontaxpaid liquors which were being illicitly removed, deposited or concealed.

It was said that Section 26 of the National Prohibition Act provided a distinct, full and complete rule and procedure for such cases and evinced an intention on the part of Congress to provide for such cases more elastic and equitable law than the Revenue Statutes.

The first important case to arise after the National Prohibition Act became operative, touching upon this question, was that of *Yuginovich v. United States*, 256 U. S. 450. It declared that Section 35, Title II, of the National Prohibition Act, superseded certain Internal Revenue Statutes providing public revenues out of distillery operations; that Section 35 providing penalties instead of taxes took the place of the Revenue Statutes. The decision was on June 1, 1921, prior to the Act Supplemental to the National Prohibition Act (42 Stat. 222), November 23, 1921, known as the Willis-Campbell Act.

United States v. Stafoff, Remus et al, 260 U. S. 477, involved statutes providing revenues out of the business of rectifying, wholesaling and retailing intoxicating liquors and raised the question whether the statutes were still operative in view of the provisions of the National Prohibition Act. The Stafoff case affirmed the Yuginovich case but avoided the effect of it by holding that the Yuginovich case states the law as it was during the interim between the adoption of the National Prohibition Act and the Supplemental Act, but that the Supplemental Act had the effect of re-enacting the statutes which the Yuginovich case held had been repealed and that the Yuginovich case therefore no longer states the law. Yet these cases are authority only by analogy and not decisive, because Section 3450 was not involved.

In the case *United States v. Stafoff*, 260 U. S. 477, p. 480, the court said:

"The decision in United States v. Yuginovich must stand for the law before November 23, 1921. In that case, besides what we have mentioned, it was held also that the penalty imposed by Rev. Stats. Sec. 3257 on a distiller for defrauding the United States of the tax on the spirits distilled by him was repealed. So far as the liquor is for beverage purposes the same reasoning must apply to the penalty in Sec. 3242 for carrying on the busi-

ness of rectifier or wholesale or retail liquor dealer without having paid the special tax imposed by law.

"But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms. The form of words is not material when Congress manifests its will that certain rules shall govern henceforth. Swigart v. Baker, 229 U. S. 187, 198. Of course Congress may tax what it also forbids. 256 U. S. 462. For offenses committed after the new law, United States v. Yuginovich cannot be relied upon."

The usual arguments against Section 3450 are (1) that distilled spirits are no longer subject to tax, and Section 35, Title II, of the National Prohibition Act of November 23, 1921, provide penalties in lieu of taxes; (2) that Section 26 of the National Prohibition Act covers the same ground as Section 3450 and provides a less harsh and more reasonable rule.

If there is a tax on illicitly distilled spirits then there may be a removal, deposit or concealment of the liquor to defraud the Government of the taxes thereon.

Aside from the question whether or not statutes enacted prior to prohibition and levying taxes

upon distilled spirits have been superseded or repealed by the National Prohibition Act, and the fact remains that Section 600 (a) of the Revenue Act of 1918 (Act of February 24, 1919), hereinbefore set forth, levies a tax upon such spirits.

Said Section 600 (a) was passed after the ratification of the Eighteenth Amendment to the Constitution on January 16, 1919. At that time Congress was giving serious consideration to the provisions of the proposed National Prohibition Act, which was adopted on October 28, 1919. There is no basis for contending that the above mentioned section of the Revenue Statutes was not intended to operate as to intoxicating liquors beyond the interim from its passage to the time that the Eighteenth Amendment should become operative. There was as much basis for it not being applicable to intoxicating liquors produced during that period as there is for holding it inapplicable to intoxicating liquors produced since the National Prohibition Act became operative, for the reason the War Prohibition Act (Act of November 21, 1918, 40 Stat. 1045), and the Food Control Act with its prohibitive features (Act of August 10, 1917, c. 53, 40 Stat. 282) were in force and effect and as a matter of fact had established prohibition, because it is im-

possible to produce distilled spirits without the use of food products that were prohibited by the Food Control Act. (See Section 3248 R. S.)

In *Hamilton, Collector, v. Kentucky Distilleries and Warehouse Company*, 288 Fed. 326, C. C. A., 6th, it was held that the tax imposed by said Section 600 (a) upon distilled spirits in bond payable when they are withdrawn is not in a technical sense a withdrawal, but is equivalent to "removed" and applies to spirits stolen from a bonded warehouse without the knowledge or consent of the owner.

That a tax is in fact imposed is supported by the following cases:

Yuginovich v. United States, 256 U. S. 450.

United States v. Stafoff et al, 260 U. S. 477.

Payne v. United States, 279 Fed. 112 (5 C. C. A.).

The Tuscan, 276 Fed. 55.

Maresca v. United States, 277 Fed. 727.

United States v. One Essex, 291 Fed. 479, 276 Fed 28.

United States v. One Cadillac, 292 Fed. 773.

Violette v. Walsh, 282 Fed. 582 (9 C. C. A.); also, 272 Fed. 1014 (D. C. Mont.).

Reo-Atlanta Co. v. Stern, 279 Fed. 422.

Goldberg v. United States, 280 Fed. 89 (5 C. C. A.

Parilla v. United States, 280 Fed. 761 (6 C. C. A.

Spirituous liquors become liable for the tax upon their production.

United States v. National Surety Company, 122 Fed. 904.

United States v. N. S. F. & G. Co., 220 Fed. 792.

Section 3246 R. S.

The Government does not wait to ascertain for what purposes intoxicating liquors shall be diverted before imposing the initial tax. This is partly for the reason that if illicitly used liquors should not be subject to tax then the law abiding producer would be burdened with a tax and his competitor, the illicit manufacturer, would profit by his own wrong so long as he was not detected. *United States v. Thompson*, 189 Fed. 838.

If illicit liquor is not subject to tax it is well to consider whether or not the bootlegger's unlawful income from illicit sales is subject to income tax in view of the conclusions reached in *Pollock*

v. Farmers Loan & Trust Company, 157 U. S. 429, 581, that where the source is not subject to taxation neither is the income.

The Circuit Court of Appeals for the Ninth Circuit in *Violette v. Walsh*, 282 Fed. 582, decided that a person engaged in the illicit manufacture of intoxicating liquors was not exempt from a tax assessment under the Revenue Act of February 24, 1919, 600 (a), imposing a tax on the manufacture of distilled spirits, in view of the provisions of Section 35, Title II, National Prohibition Act, that the act shall not relieve anyone imposing a tax on the manufacture of liquor.

It must not be overlooked that *general revenue laws are not superseded by subsequent statutes unless the later statutes specifically so provide. United States v. Barnes*, 222 U. S. 513.

The National Prohibition Act levies no taxes, therefore it cannot, as a taxing statute, supersede any of the Revenue Statutes. Section 35, Title II, imposes a penalty upon the unlawful manufacture or sale, but does not impose a tax upon production. It is a penalty for unlawful conduct rather than a contribution to the public revenue.

Fontenot v. Accardo, 278 Fed. 871.

The Tuscan, 276 Fed. 55.

United States v. One Essex, 291 Fed. 479.

Lipke v. Lederer, 259 U. S. 557.

Regal Drug Co. Case, 260 U. S. 386.

Ketchum v. United States, 270 Fed. 416.

Section 3450 is a law passed in the interest of the public revenue for the punishment of evaders of taxes, while Section 26 was enacted for the punishment of violators of prohibition engaged in the unlawful traffic in intoxicating liquors. The objects of said statutes are different, the subject matter largely different, and the *modus operandi* very much different. Section 3450 affects only untaxpaid liquors. It also operates upon a vehicle, although not in motion, used in the unlawful removal. It has no commiseration for the unoffending third party in interest. Section 26 applies to intoxicating liquors, regardless of taxes, transported in violation of the National Prohibition Act. The vehicle must be seized while in motion. The offending person must be convicted before the confiscation of the vehicle can be effected. As pointed out, Section 6 provides a very generous method for innocent owners and lien holders to come in and establish their claims.

Most of the courts holding that Section 3450 has been superseded by the National Prohibition Act, we think, have been influenced almost entirely in arriving at their conclusions by the fact that the National Prohibition Act provides a very humane method for third parties inetrested in the property to protect their interests. They do not approve of the harsh terms of the Revised Statutes and are glad of the opportunity to grant relief through the above mentioned generous provisions of the National Prohibition Act. However, in following this line of reasoning they overlook the fact that the Government has the power to provide for the forfeiture of the rights of the interested third parties in the manner provided in Section 3450. We need only point out, by reference to the *Mugler v. Kansas* case, 123 U. S. 623, the extreme to which the Government may go in the enforcement of principles of law for the general welfare. We have also pointed out that the Government may enact such extreme and arbitrary measures in the interest of the pulbic revenues as are essential to the operation of governmental functions.

Decisions of forfeiture arising under other statutes are not of much assistance in construing the force and effect of Section 3450. Many of the

other forfeiture statutes, particularly with respect to Maritime Law, because of the exigencies of the shipping business, are provided with safety valves similar to that found in the National Prohibition Act.

But ships may also be arbitrarily forfeited for carrying untaxpaid or unmanifested articles regardless of the guilt of the master, mate or owners of the vessel if the supreme government power sees fit in the interest of its revenue to provide for forfeitures in such cases. An old and leading case taking this view is *Mitchell v. Torup,* Parker 227. There a ship was importing 221 pounds of tea put on board in Norway by mariners on their own account without the privity of the master, mate or owners. The vessel was held forfeited under the terms of the provisions of the statute 12 Car. 2, c. 4 (Court of Exchequer, 1766). It was there held emphatically that the privity of the master was not necessary under the statute.

Therefore, the authority for the *Goldsmith-Grant Company* case goes back a long way into English jurisprudence.

CASES HOLDING SECTION 3450 NOT REPEALED.

The cases taking the view that Section 3450 and other Revenue Statutes not inconsistent with the National Prohibition Act have not been repealed or superseded by it may be grouped as follows:

Cases pointing out that the Revenue Statutes deal with different subjects than the National Prohibition Act and therefore are still in force:

United States v. Sylvester, 273 Fed. 253, District Court of Connecticut, March 8, 1921.

United States v. One Cole Aero Eight Automobile, 273 Fed. 934, District Court of Montana, June 28, 1921.

United States v. One Essex Touring Automobile, 266 Fed. 138, District Court, Northern District of Ohio, July 1, 1920.

United States v. Brockley, 266 Fed. 1001, District Court Middle District of Penna., Sept. 14, 1920.

United States v. One Essex Touring Car, 276 Fed. 28, District Court, Northern Georgia, August 8, 1921.

United States v. Sohm et al, 265 Fed. 910, District Court of Montana, July 12, 1920.

Payne v. United States, 279 Fed. 112, C. C. A., 5th, February 15, 1922.

United States v. DeLarge et al, 269 Fed. 820, District Court of Nebraska, February, 1921.

United States v. Freidericks et al, 273 Fed. 188, District Court, New Jersey, May, 1921.

Fontenot, Collector, etc., v. Accardo (and four other cases), 278 Fed. 871, C. C. A., 5th, February, 1922.

See also:

Goodfriend et al v. United States, 294 Fed. 148, C. C. A., 9th, December 17, 1923.

United States v. Story, 294 Fed. 517, C. C. A. 5th, November 30, 1923.

United States v. 385 Barrels of Wine, 300 Fed. 565, District Court of Southern New York, June 5, 1924.

Other cases holding that in view of the plain provisions of the Act Supplemental to the National Prohibition Act, the Revenue Statutes are in force or if they were repealed by the National Prohibition Act they haev been revived by the later statutes:

United States v. Torres, 291 Fed. 138, District Court of Maryland, July 24, 1923.

The Cherokee, 292 Fed. 212, District Court, Southern Texas, August 13, 1923.

United States v. One Ford Automobile, 292 Fed. 207, District Court, Southern Texas, August 13, 1923.

United States v. Knoblauch, 291 Fed. 407, District Court of Nebraska, July 30, 1923.

United States v. One Ford Automobile, Vol. 1 (2nd) Fed. 654, Eastern District of Tennessee, May 2, 1924.

United States v. One Bay State Roadster, 2 Fed. (2nd) 616, District Court of Connecticut, October 23, 1924.

United States v. One Ford Coupe; Same v. One Cadillac Roadster, 3 Fed. (2nd) 64, District Court, Western District of Louisiana, December 5, 1924.

United States v. One Durant Touring Car, 2 Fed. (2nd) 478, District Court, Western District of Texas, December 15, 1924.

A large number of decisions hold that intoxicating liquors are still subject to tax, although the National Prohibition Act regulates and prohibits:

United States v. One Essex Coupe, et al, 291 Fed. 479, District Court of Montana, August 1, 1923.

Payne v. United States, 279 Fed. 112, C. C. A. 5th, February 15, 1922.

Reo-Atlantic Company v. Stern, 279 Fed. 422, District Court, Northern Georgia, January 16, 1922.

United States v. One Ford Sedan, 297 Fed. 830, C. C. A. 5th, March 25, 1924.

The Tuscan, 276 Fed. 55, District Court, Southern Alabama, October 10, 1921.

United States v. One Cadillac Automobile, 292 Fed. 773, District Court, Eastern Illinois, October 1, 1923.

United States v. One Buick Roadster, 280 Fed. 517, District of Montana, April 28, 1922.

Bullock v. United States, 289 Fed. 29, C. C. A. 6th, May 8, 1923.

Hamilton v. Kentucky Distilleries & Warehouse Co., 288 Fed. 326, C. C. A. 6th, April 3, 1923.

Skilken v. United States, 293 Fed. 923, C. C. A. 6th, November 6, 1923.

Parilla et al. v. United States, 280 Fed. 761, C. C. A. 6th, May 12, 1922.

Lewis v. McCarthy et al, 274 Fed. 496, District Court of Massachusetts, June 15, 1921.

United States v. One Ford Automobile; Same v. One Ford Touring Automobile, 2 Fed. (2nd) 882, District Court, Western Tennessee, July 20, 1924.

In the case of *United States v. One Ford Automobile*, 2 Fed. (2nd) p. 882 at p. 884, the court said:

"It appears that the construction given the act of 1921 in the Stafoff case is that by its terms Congress has re-enacted those laws which had been held to be repealed by the cases above referred to as being in conflict with the National Prohibition Act, and that the latter act must now prevail, since the Supreme Court has held that by its provisions Congress has re-enacted the laws referred to therein as if the same had been set out in the latter act in terms. This was said without commenting upon the peculiar wording of section 5 of the Act of 1921. If this section should be construed literally as to what laws are re-enacted, it is meaningless and re-enacts nothing, since it is said that all laws in regard to the manufacture and taxation of and traffic in intoxicating liquors and all penalties for violation of such laws that were in force when the National Prohibition Act was enacted shall be and continue in force as to both beverage and non-beverage liquors 'except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this act.' (Italics mine.) The literal wording of this exception, as above stated, would re-enact nothing, for the reason that the National Prohibition Act repealed nothing except what was in conflict with it, and if such laws are not re-enacted by this later act, then section 5 loses force altogether and means nothing. If its words are to be literally construed, the holding in United States v. Lewis, supra, to the effect that Section 3450 has been repealed by Sec-

tion 26 of the National Prohibition Act as being in conflict with this latter section, would have section 3450 standing now repealed and the remedy sought by the Government in these cases could not be enforced. However, in construing section 5, as in all questions involving the construction of a statute, the primary object of inquiry is to determine the legislative intent as it appears from the act as a whole. Furthermore, it is a well-established rule that courts will give a meaning to legislative enactments where consistently possible, rather than to hold them meaningless. * * * By giving to section 5 the construction placed thereon by the Supreme Court in the Stafoff case then under the same reasoning heretofore applied by the courts which have held section 3450 repealed by section 26 of the National Prohibition Act, it would seem that section 26 of the *National Prohibition Act must now stand repealed in so far as there may be any conflict between it and section* 3450, *since section* 3450 *has been re-enacted by the act of* 1921. However, this question is not here determined, for the reason that it now appears to me the two sections may well stand without such a holding. * * * Granting this to be true, parties dealing in liquors unlawfully are now liable for a tax, and when Congress endeavors to pass an act in aid of existing laws, if it did not intend that the existing laws where not clearly in conflict with the later act should be repealed, it would seem that a construction should be placed upon the later act, which, if possible, would leave in force those laws which Congress sought to retain.

"The rule that repeals by implication are not favored is well known, and it is a well-established principle of law that a repeal by implication is never favored unless the statutes under consideration are so repugnant as to preclude any other conclusion. South Carolina v. Stoll, 17 Wall. 425, 430, 21 L. Ed. 650. The question does not stand as if Congress had contented itself in the National Prohibtiion Act, with a simple repealing clause. Surely it had some purpose in inserting the positive provisions referred to in section 35. It appears reasonable that in section 3450 in certain of its provisions could be left in force as not being directly antagonistic to the provisions of section 26, such construction should be placed thereon.

"If section 3450 has been destroyed by the National Prohibition Act and has not been revived by section 5 of the Act of November 23, 1921, the instant cases afford striking illustrations of a serious defect in section 26 of the National Prohibition Act, in that as this latter section has been construed it is necessary not only that the vehicle seized must have been so seized while being used in the very act of transporting intoxicating liquor, and that the government must go further, in that it must apprehend the party so using the vehicle and convict such party before the seized vehicle can be declared forfeited. It will readily be seen how easy it would be to evade this statute. The party in charge of the vehicle sought to be seized may abandon it while being pursued, escape the officers, and thus the Government be left to the necessity of merely confiscating whatever liquor

may be found in the vehicle and leaving it for the law violator to again use at his pleasure. Is this in keeping with the argument that it was the desire of Congress to absolutely prohibit all traffic in intoxicating liquors? Can it be said that the Congress of the United States could not foresee the ease with which this statute might be evaded? Is it not more reasonable that with this possibility in view Congress had in mind the fact that, if such vehicle should be abandoned by the law violator, the Government, under section 3450, would have its remedy, and that, inasmuch as section 3450 was broad in its provisions, Congress desired to leave it in force except where section 26 by unmistakable terms superseded some of its provisions or by this later act to re-enact it even at the expense of section 26? As has been pointed out in some of the decisions above mentioned, section 26 proceeds against the person, while section 3450 proceeds against the res. Furthermore, as just stated, under the construction placed upon section 26 it is limited to vehicles in motion; section 3450 covers vehicles not in motion. Under section 26 no forfeiture may be had unless the driver or owner is apprehended and convicted; under section 3450, this is not necessary. Under section 26, it is immaterial whether the taxes have or have not been paid if the liquor was being unlawfully transported; while under section 3450 tax-paid liquors, regardless of how they were being transported, could not be reached, and only untaxpaid liquors might be reached, and that where they were being so stored or concealed as that it was done with the intention of defraud-

ing the Government of the taxes due thereon. If Congress really intended the National Prohibition Act to stand, as it said, in aid of existing laws may it not now be said that by section 5, above quoted, it has endeavored to make provisions whereby that purpose may be carried out, and certainly it has manifested an intention that a statute shall not now stand repealed in aid of which the National Prohibition Act might so well be invoked in many instances, and is it not reasonable to assume that with the powers possessed by the government under section 3450, it was the intention of Congress by the enactment of section 5 of the act of November 23, 1921, to revive these powers as additional remedies to those provided by section 26 of the National Prohibition Act, if they have been repealed by that act, so that the storing or removing or concealment of untaxpaid liquors in vehicles such as are here in question would bring about a forfeiture of the vehicle in cases where the party could not be reached under the provisions of section 26, and so that a system might be established whereby almost any conceivable character of illegal traffic in liquors, for beverage or non-beverage purposes might be reached by statutory provisions, and the offender, whether it should be the person or the res, be made subject to the penalties or punishment provided. It occurs to me that any other construction would have the effect of destroying the remedies provided in these various sections rather than to have them stand in aid of each other."

In the case of *United States v. One White One-Ton Truck,* 4 Fed. (2nd) 413, at page 414, Judge Cushman said:

"It has been contended upon behalf of claimant, that the burden of showing a nonpayment of the tax rests upon libellant. These spirits were fit for beverage purposes, and contained one-half or more than one-half of one per cent, of alcohol by volume, the importation, manufacture, transportation, sale and possession of which are prohibited by the Volstead Act. Section 1, Par. 813, of the Tariff Act of 1923, 42 Stat. at Large, p. 898; Comp. Stat. Ann. Supp. 1923, Sec. 5841a, provides:

" 'No wines, spirits, or other liquors or articles provided for in this schedule containing one-half of 1 per centum or more of alcohol shall be imported or permitted entry except on a permit issued therefor by the Commissioner of Internal Revenue, and any such wines, spirits, or other liquors or articles imported or brought into the United States without a permit shall be seized and forfeited in the same manner as for other violations of the customs laws.'

"The court takes judicial notice of the fact that the Commissioner of Internal Revenues will not issue such a permit for the importation of such spirtis into a state having what is popularly known as a 'bone dry' law, as has the State of Washington. Under such conditions there is no presumption warranted in law that spirits so seized have paid the tax; rather, the only presumption reasonably warranted is that the tax has not been paid.

"Section 3333, R. S.; Comp. Stat. Sec. 6130, provides 'Whenever seizure is made of any distilled spirits * * * in respect to which the owner or person having possession, control, or charge of said spirits, has omitted to do any act required to be done, or has done or committed any act prohibited in regard to said spirits, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed, and that all the requirements of the law in relation to the payment of the tax have been complied with.'

"It is not necessary to determine whether this statute is applicable to a case as the present where a claim is made to the automobile and not the spirits. As the ordinary and natural result of the manner of carriage was to conceal from the officers of the internal revenue the nature of the article carried, and thereby hinder and prevent the collection of the tax due thereon, the presumption is warranted, in the absence of controverting evidence, that the deposit and concealment in the truck were with intent to defraud the United States of the tax which was due upon these distilled spirits, whether they were of domestic or foreign manufacture. United States v. Stafoff, supra; Goldsmith-Grant Company v. United States, 254 U. S. 505, 41 S. Ct. 189, 65 L. Ed. 376.

"Decree of forfeiture as prayed."

CASES HOLDING SECTION 3450 IS REPEALED.

The decisions holding that Section 3450 is not in full force have been decided from various viewpoints, namely:

That Section 26, Title II, of the National Prohibition Act covers the same ground as Section 3450 to such an extent as to make it clear that Section 26 was intended to supersede Section 3450:

United States v. One Haynes Automobile, etc., 268 Fed. 1003, District Court, Southern Florida, December 8, 1920.

Lewis v. United States, 280 Fed. 5, C. C. A. 6th, April 14, 1922.

United States v. One Packard Motor Truck, 284 Fed. 395, District Court, Southern Michigan, October 30, 1922.

Reed v. Thurmond, 269 Fed. 252, C. C. A. 4th, November 4, 1920.

United States v. Yuginni et al, 266 Fed. 746, District Court, Oregon, July 13, 1920.

That Section 26 not only substantially covers the same ground as Section 3450 as to intoxicating liquor, but provides a less harsh and more equitable

rule and therefore was intended to supersede Section 3450:

> *McDowell v. United States*, 286 Fed. 521, C. C. A. 9th, February 5, 1923.
>
> *One Big Six Studebaker Automobile etc. v. United States*, 289 Fed. 256, C. C. A., May 28, 1923.
>
> *United States v. One Paige Automobile, et al*, 277 Fed. 524, District Court, Southern Texas, January 7, 1922.
>
> See also *Lewis v. United States*, 280 Fed. 5.

Some of the courts have reasoned that Section 3450 is superseded by Section 26, because the latter statute provides a new method for handling illegal liquor transactions

> *Bruno v. United States*, 289 Fed. 649, C. C. A, 5th, June 4, 1923.
>
> *United States v. American Brewing Company*, 296 Fed. 772, District Court, Eastern Pennsylvania, February 15, 1924.
>
> *In re Food Conservation Act*, 254 Fed. 893, District Court, Northern New York, December 26, 1918.

Other courts take the view that revenue statutes encourage production to increase the revenues and the National Prohibition Act discourages production of intoxicating liquors, and it would be incon-

sistent to hold that the revenue statutes were retained to aid prohibition enforcement:

> *United States v. Windham*, 264 Fed. 376, District Court, Eastern South Carolina, March 16, 1920.
>
> *Ketchum v. United States and two other cases*, 270 Fed. 416, C. C. A. 8th, February 28, 1921.

That in order for 3450 to apply there must be a tax due, and, because intoxicating liquors are no longer subject to tax, Section 26 supersedes Section 3450:

> *One Ford Touring Car et al v. United States*, 284 Fed. 823, C. C. A. 8th, October 21, 1922.
>
> *United States v. One Haynes Automobile*, 274 Fed. 926, C. C. A. 5th, July 25, 1921.

It is also reasoned that because intoxicating liquors are now contraband the procedure provided in the National Prohibition Act supersedes certain customs statutes:

> *The Goodhope*, 268 Fed. 694, District Court, Western Washington, October 14, 1920.

In certain narcotic cases which are often cited in prohibition cases as authority and analogy, it is contended that 3450 does not apply to vest pocket narcotic peddling where an automobile aids in bringing the peddler to his customer, for the reason

there is not such a removal, deposit or concealment as Section 3450 contemplates:

United States v. One Cadillac Automobile, 2 Fed. (2nd) 886, District Court, Western Tennessee, May 28, 1924.

United States v. One 1920 Premier Automobile, 297 Fed. 1007, C. C. A. 9th, April 21, 1924.

United States v. One Kissel Touring Automobile, 289 Fed. 120, District Court of Arizona, May 9, 1923.

United States v. One Ford Automobile Truck (*United States v. One Paige Seven-Passenger Touring Autmobile*), 286 Fed. 204, District Court, Western Washington, January 12, 1923.

United States v. One Kissel Touring Automobile, 296 Fed. 688, C. C. A. 9th, March 3, 1924.

United States v. Magana, 299 Fed. 492, C. C. A. 8th, May 6, 1924.

United States v. One Haynes Automobile, et al, 290 Fed. 399, District Court, Northern California, June 15, 1923.

It has been decided recently that the removal in Section 3450 is not the same as the transportation in Section 26, Title II, of the National Prohibition Act, but means a removal from a fixed place of

production or the like to a place where the tax may be more easily avoided.

United States v. One Buick Automobile (3 cases), 300 Fed. 584, District Court, Southern California, July 22, 1924.

United States v. One Buick Sedan, 1 Fed. (2nd) 997, District Court, Southern California, October 4, 1924.

RESUME.

The above leading cases, bearing upon the question of the applicability of Section 3450 to transportation of nontaxpaid liquor since the adoption of Section 26 of the National Prohibition Act, show a decided weight of authority in favor of the continuance and advisability of Section 3450.

If the effect of the Yuginovich case was to hold that Section 3450 had been superseded by the National Prohibition Act, then the effect of the Stafoff case was to hold that such statutes were revived by the Act Supplemental to the National Prohibition Act.

The Goldsmith-Grant Company case decided that an automobile found transporting intoxicating liquor upon which no revenue tax has been paid (the transportation being such as would also be a

violation of the National Prohibition Act) was forfeitable regardless of the claims of the seller as owner under a conditional sale contract by which he retained title until completion of the purchase price. This case makes it clear that the third party's interests were secondary and junior to the Government's interest, on account of the public revenue. This decision is open to only one exception and that is where the vehicle is being used in violation of the statute by some one who has obtained it by fraud or theft.

It is insisted that by weight of authority Section 3450 has not been repealed or superseded by the National Prohibition Act; but on the contrary both laws are in full force and effect, and that in seizures of the class herein involved, if an automobile is seized while in motion it may be forfeited under either section. If the car is not in motion, it may be forfeited only under Section 3450.

II

In this case the evidence on the part of the Government showed that one Nadeau, the contract purchaser of the car, told the officers before they searched the car, that he had moonshine whiskey in the car; that he owed about $700.00 and had

been bootlegging trying to earn enough to pay for the car (Tr. 32); that no tax had been paid on this liquor either to the Collector of Customs or Collector of Internal Revenue for the District of Washington.

The driver, Nadeau, took the stand and testified that he had purchased the liquor from a man whom he had met for the first time on the previous day, that he did not know his name; that the liquor was sold and delivered to him at some place on the highway. (Tr. 70.)

Appellant contends that Nadeau was guilty only of transportation of moonshine liquor and was under no duty to pay any tax—that there is no tax due upon the liquor and no place to pay it.

It has been pointed out that this Court has held that a tax can be assessed against illicit liquor, *Violett vs. Walsh*, 282 Fed. 582.

Section 35 of the National Prohibition Act provides that no one shall be relieved from paying taxes upon the manufacture or traffic in such liquor.

Nadeau not only transported the liquor, but had deposited and concealed it (non-tax paid liquor), in his car to defraud the Government of the tax due upon it.

The purchase of the liquor upon the highway, his traffic in intoxicating liquor, and all the surrounding circumstances as well as his admissions to Government agents, were sufficient to justify the jury in finding that an intent to defraud the Government of a tax existed.

The burden was upon him under 3333 R. S. to show that no fraud had been committed and that all of the requirements of the law in relation to the payment of the tax had been complied with—this he failed to do.

Appellant's contention that the prosecution of the driver, Nadeau, for transportation bars this action under 3450.

The count in the information charging unlawful transportation, did not specify this car by name or description.

There is no question as to the authority of the Government to have described the car and forfeited same in proceedings incidental to the criminal action.

The question for decision here is: Was the Government compelled to follow that course, or did it have the right to an election of remedies.

The Government insists that inasmuch as these liquors were non-tax paid, two laws were violated, and that the right of election existed.

This is not a case where an innocent man had been employed to haul liquor, or some other situation where no evasion of the revenue laws could be imputed to the driver or owner, but that of a bootlegger knowingly, depositing and concealing liquor in his car and knowingly violating two laws.

It would be just as consistent to say that a man could not be prosecuted for operating a still under the revenue laws because the National Prohibition Law prohibits the same thing and *provides a lesser penalty*, whereas, the *Staffof* case has said that he can be prosecuted under either.

Under Section 26, the person is tried—under 3450, the automobile is on trial. Both laws have been violated and conviction under one is not a bar to conviction under the other.

Congress has sought to preserve the Revenue Laws by direct legislation and has done so as effectively as if it had re-enacted those laws in so many words. It is not in the province of the courts, by the use of unnatural, unusual and an artificial display of words to undo its clear legislative intent.

The Collector of Internal Revenue is authorized and directed to collect taxes upon intoxicating liquors, in no uncertain words, in the Act of November 23, 1921, when Congress knew of the overlapping provisions in the various laws and of all the obstacles and difficulties lying along the road of Prohibition enforcement.

It is most earnestly contended that 3450 R. S. and Section 26 do not conflict but are consistent with each other; and that one act may constitute a violation of both laws and that the Government may elect to proceed under either law.

Respectfully submitted,

THOS. P. REVELLE,
United States District Attorney,

J. W. HOAR,
Assistant United States Attorney.

Attorneys for Defendant in Error.

No. 4503

United States Circuit Court of Appeals

For the Ninth Circuit

FRED MERRILL,
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error

Transcript of Record

Upon Writ of Error to the District Court of the United States for the District of Oregon

---

FILED

No..................

United States Circuit Court of Appeals

For the Ninth Circuit

FRED MERRILL,
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error

Transcript of Record

Upon Writ of Error to the District Court of the United States for the District of Oregon

INDEX

Arraignment 6
Assignments of Error 15
Bail Bond on Writ of Error 41
Bill of Exceptions 44
Certificate of Clerk 176
Citation on Writ of Error 1
Information 4
Instructions of Court to Jury 160
Motion for New Trial 8
Motion in Arrest of Judgment 9
Order allowing Writ of Error 40
Order denying Motion for New Trial and in arrest of judgment 11
Petition for Writ of Error 12
Plea 7
Sentence 12
Stipulation 175

TESTIMONY ON BEHALF OF PLAINTIFF:

Barker, H. L. 118
Gates, A. B. 57
Hurlburt, T. M. 121
Johnson, Ethel V. 52
Linville, Lloyd 120
Meade, Ruth 94
Nelson, Milton O. 45
Nickell, W. H. 47
Randall, Martha 117
Rexford, P. V. 119

TESTIMONY ON BEHALF OF DEFENDANT:

Aylsworth, E. W. 149
J. J. Braund 154
Carroll, C. E. 144
Merrill, Fred 125
Sherman, Ivan M. 135
Underwood, Russell 140

Verdict 7
Writ of Error 2

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

BARNETT H. GOLDSTEIN, E. M. MORTON, 1225 Yeon Building, Portland, Oregon,

For the Plaintiff in Error.

JOHN S. COKE, United States Attorney; J. O. STEARNS, JR., Assistant United States Attorney, Federal Building, Portland, Oregon,

For the Defendant in Error.

CITATION ON WRIT OF ERROR

United States of America, District of Oregon, ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Fred Merrill, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said Dis-

trict, this 15th day of May, in the year of our Lord, one thousand, nine hundred and twenty-four.

CHAS. E. WOLVERTON,
Judge.

United States of America, District of Oregon, ss:

Service of the within Citation on Writ of Error accepted in Portland, Oregon, this 15th day of May, 1924.

J. O. STEARNS,
Attorney for Plaintiff.

Endorsed: Filed May 15, 1924.

G. H. MARSH, Clerk.

WRIT OF ERROR

The United States of America, ss.

The President of the United States of America.

To the Judge of the District Court of the United States for the District of Oregon—Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Chas. E. Wolverton, one of you, between United States of America, plaintiff and defendant in error, and Fred Merrill, defendant and plaintiff in error, a manifest error hath happened to the great damage of said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this

behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Hon. William Howard Taft, Chief Justice of the United States, this 15th day of May, 1924.

G. H. Marsh,

Clerk of the District Court of the United States for the District of Oregon.

By F. L. Buck, Chief Deputy.

Endorsed: Filed May 15, 1924.

In the District Court of the United States for the District of Oregon

March Term, 1923

Be it remembered that on the 25th day of May, 1923, there was filed in the District Court of the

United States for the District of Oregon, an Information in words and figures as follows, to-wit:

Be it remembered, that J. O. Stearns, Jr., Assistant Attorney of the United States for the District of Oregon, who prosecutes in behalf and with the authority of the United States, comes here in person into Court at this term thereof, and for the United States gives the Court to understand and be informed that one Fred Merrill, the defendant above named, on, to-wit, the 10th day of May, 1923, at that place of business known as "The Plantation Inn," located on lot 11, section 3, T. 1 South, Range 3 East of the Willamette Meridian, in the District aforesaid, unlawfully and knowingly did have in his possession a quantity of intoxicating liquor, to-wit: whiskey and gin, fit for beverage purposes and containing more than one-half of one per cent of alcohol by volume, in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT TWO

That Fred Merrill, the defendant above named, on, to-wit, the 10th day of May, 1923, at that place of business known as "The Plantation Inn," located on Lot 11, Section 3, T. 1 South, Range 3 East of the Willamette Meridian, in the State and District of Oregon, unlawfully and knowingly did sell a quantity of intoxicating liquor, to-wit: whiskey and gin, fit for beverage purposes and contain-

ing more than one-half of one per cent of alcohol by volume, in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT THREE

That Fred Merrill, the defendant above named, on, to-wit, the 10th day of May, 1923, at that place of business known as "The Plantation Inn," located on Lot 11, Section 3, T. 1 South, Range 3 East of the Willamette Meridian, in the State and District of Oregon, unlawfully and knowingly did maintain a common nuisance within the meaning of the National Prohibition Act, wherein intoxicating liquor, fit for beverage purposes, was then and there kept and sold in violation of the National Prohibition Act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Whereupon, the said United States Attorney for the District aforesaid prays the consideration of this Court here in the premises, and that due process of law may be awarded against the said Fred Merrill, defendant, in this behalf to make him answer to the United States touching and concerning the premises.

Dated at Portland, this..............day of May, A. D. 1923.

(Signed) J. O. STEARNS, JR.,
Assistant United States Attorney for the District of Oregon.

United States of America, District of Oregon, ss.

I, J. O. Stearns, Jr., Assistant United States Attorney for the District of Oregon, being sworn, do say that the foregoing information is true as I verily believe.

(Signed) J. O. STEARNS, JR.

Subscribed and sworn to before me this 25th day of May, A. D. 1923.

G. H. MARSH,

Clerk of the United States District Court for the District of Oregon.

By E. M. MORTON, Deputy.

Endorsed: Filed May 25, 1923.

And afterwards, to-wit, on Friday, the 25th day of May, 1923, the same being the 68th Judicial day of the Regular March Term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(Title)

No. C-10294. May 25, 1923

Information: Sections 3 and 21, Title 2, National Prohibition Act.

Now at this day upon motion of Mr. Joseph O. Stearns, Jr., Assistant United States Attorney,

It is ordered that he be and is hereby allowed to file an information charging the defendant above named with the violation of Sections 3 and 21, Title 2, of the National Prohibition Act. And thereafter comes into court said defendant by Mr. Barnett H.

Goldstein, of counsel, and by his said counsel duly waives arraignment herein. Whereupon, on motion of said defendant,

It is further ordered that he be and is hereby allowed until Monday, May 28, 1923, at 2 o'clock p. m., to plead to said information.

And afterwards, to-wit, on Monday, the 28th day of May, 1923, the same being the 70th Judicial day of the Regular March Term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

(Title)

No. C-10294. May 29, 1923

Indictment: Sections 3 and 21, Title 2, National Prohibition Act.

Now at this day come the plaintiff by Mr. Joseph O. Stearns, Jr., Assistant United States Attorney, and the defendant by Mr. Barnett H. Goldstein, of counsel, whereupon this being the time set for the entry of plea to the indictment herein, said defendant for plea to said indictment by his counsel says he is not guilty. Whereupon, on motion of plaintiff,

It is ordered that this cause be and the same is hereby set for trial for July 12, 1923.

And afterwards, to-wit, on the 18th day of January, 1924, there was duly filed in said court and cause the

VERDICT

of the jury, in words and figures as follows:

(Title)

We, the jury, duly impaneled to try the above entitled cause, do find the defendant Fred Merrill

Guilty as charged in Count One of the information herein;

Guilty as charged in Count Two of the information herein;

Guilty as charged in Count Three of the information herein.

Dated at Portland, Oregon, this 17th day of January, 1923.

(Signed) FRANK M. KIGHT,
Foreman.

Filed: January 18, 1924. G. H. Marsh, Clerk.

And thereafter and on the 7th day of February, 1924, there was filed in said court a

MOTION FOR NEW TRIAL

in words and figures as follows, to-wit:

(Title)

Comes now the defendant in the above entitled cause by Barnett H. Goldstein, his attorney, and moves the court to set aside the verdict rendered herein and to grant a new trial for the following reasons and upon the following grounds:

I.

That the Court upon the trial of the case admitted incompetent evidence offered by the United States.

II.

That the Court upon the trial of the case excluded competent evidence offered by the defendant.

III.

That the Court upon the trial of the case improperly limited and restricted the cross-examination of certain witnesses offered by the United States.

IV.

That the Court improperly instructed the jury to defendant's prejudice.

V.

That the Court improperly refused, to defendant's prejudice, to give correct instructions tendered by the defendant.

VI.

That the verdict is not supported by evidence and is contrary to the law of the case.

BARNETT H. GOLDSTEIN,
Attorney for Defendant.

Filed February 7, 1924. G. H. Marsh, Clerk.

And on the said 7th day of February, 1924, there was filed in said court and cause a

MOTION IN ARREST OF JUDGMENT

in words and figures as follows, to-wit:

(Title)

Now, after verdict against the said defendant

and before sentence, comes the herein named defendant in his own person and by Barnett H. Goldstein, his attorney, and moves the court to arrest judgment herein and not to pronounce same for the following reasons:

I.

On the ground and for the reason that the information filed herein is not properly verified.

II.

Upon the ground and for the reason that Count I of the information does not state facts sufficient to constitute an offense or crime against the laws of the United States.

III.

Upon the ground and for the reasons that the verdict upon Count III of the Indictment is not supported by any evidence in the case.

IV.

Upon the ground and for the reason that the verdict upon Counts I, II and III and on each Count thereof is contrary to law.

FRED T. MERRILL,

Defendant.

BARNETT H. GOLDSTEIN,

Attorney for Defendant.

Filed, February 7, 1924. G. H. Marsh, Clerk.

And afterwards, to-wit, on Monday, the 18th day of February, 1924, the same being the 87th Judicial day of the Regular November Term of said Court;

present the Honorable Charles E. Wolverton, U. S. District Judge, presiding, the following proceedings were had in said cause, to-wit:

(Title)

No. C-10294 February 18, 1924.

Indictment: Sections 3 and 21, Title 2, National Prohibition Act

Now at this day come the plaintiff by Mr. J. O. Stearns Jr., Assistant U. S. Attorney, and the defendant above named in his own proper person and by Mr. B. H. Goldstein, of counsel, whereupon this cause comes on to be heard by the Court on the motion for a new trial, and the Court, having heard the arguments of counsel, and being fully advised in the premises, upon consideration thereof

It is ordered that said motion be and the same is hereby denied. Whereupon, on motion of said defendant,

It is ordered, that he be and is hereby allowed to Saturday, February 23, 1924, at 10 o'clock a. m., for sentence upon the verdict herein; and

It is further ordered that he be and is hereby allowed 30 days further time to submit his bill of exceptions herein.

And afterwards, to-wit, on Monday, the 25th day of February, 1924, the same being the 92nd Judicial day of the Regular November Term of said Court; present the Honorable Charles E. Wolverton, U. S. District Judge, presiding, the following proceedings were had in said cause, to-wit:

(Title)

No. C-10294 February 25, 1924.

Information: Sections 3 and 21, Title 2,
National Prohibition Act

Now at this day come the plaintiff by Mr. J. O. Stearns, Jr., Assistant U. S. Attorney, and the defendant aboved named in his own proper person and by Mr. Barnett H. Goldstein, of counsel, whereupon, this being the day set for the sentence of said defendant upon the verdict heretofore returned by the jury herein,

It is adjudged that said defendant do pay a fine of $250.00 on Counts 1 and 2 of the Information, and that he be imprisoned in the county jail of Multnomah County, Oregon, on Count 3 of the Information, for the term of six months, and that he stand committed until this sentence be performed or until he be discharged according to law. Whereupon on motion of said defendant

It is ordered, that he be and is hereby allowed a stay of execution for 45 days from this date, in which to submit his bill of exceptions.

And afterwards, to-wit, on the 15th day of May, 1924, there was duly filed in said Court a

PETITION FOR WRIT OF ERROR

in words and figures as follows, to-wit:

(Title)

No. C-10294

To the Honorable Charles E. Wolverton, Judge of the above entitled Court:

Your petitioner, Fred Merrill, plaintiff in the above entitled cause, now comes and presents this his petition as plaintiff in error for a Writ of Error to the District Court of the United States, for the District of Oregon, and shows:

That on the 25th day of February, 1924, there was rendered and entered in the above entitled court and cause a judgment wherein and whereby your petitioner was sentenced and adjudged to be imprisoned in the county jail of Multnomah County for a term of six months and to pay a fine of $250.00 and to stand committed until said sentence be performed or until it be discharged according to law.

And your petitioner further shows that he is by counsel advised that there are manifest errors in the record and proceedings of and in said cause in the rendition of said judgment of sentence, greatly to the damage of your petitioner, all of which errors will be made to appear by an examination of the record in said cause and by the Bill of Exceptions tendered and filed herein by your petitioner and in the assignments of error filed herewith.

To the end, therefore, that the said judgment and sentence and proceedings in said cause may be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner prays that a Writ of Error may be issued therefrom, directed to the United States District Court for the District of Oregon, returnable according to law and

to the rules of this Court, and that there also be directed to be returned therewith, pursuant thereto, a true copy of the record, Bill of Exceptions, Assigments of Error and all relative proceedings had in said cause; that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the errors, if any there be, may be fully corrected and full and complete justice done your petitioner. And your petitioner now makes and files herewith his Assignments of Error, upon which he will rely, and the proof of which will be made to appear by the return of said record in obedience to said writ.

Wherefore, your petitioner prays that a writ of error issue as hereinbefore prayed for and prays that his assignments of error filed herein be considered as his assignments of error upon said writ and that the judgment entered in this cause be reversed and held for naught, and said cause remanded for further proceedings and that an order be made fixing the amount of security which said petitioner shall furnish upon said writ of error and that upon the giving of such security all proceedings in the District Court of the United States for the District of Oregon be suspended and stayed until determination of the said writ of error.

BARNETT H. GOLDSTEIN,

E. M. MORTON,

Attorneys for Petitioner.

Filed, March 15, 1924. G. H. Marsh, Clerk.

An thereafter and on the 15th day of May, 1924, there was filed in said court and cause

ASSIGNMENTS OF ERROR

in words and figures as follows:

(Title)

Now comes the plaintiff in error, the defendant above named, by his counsel, and presents this assignments of error, containing the assignments of error upon which he will rely in the United States Circuit Court for the Ninth Circuit, and specifies the following particulars wherein it is claimed that the District Court erred in the court of the trial of said case.

I.

That the trial court erred in denying the defendant's motion to dismiss the information filed herein on the ground and for the reason that the same was not issued upon proper affidavit, showing probable cause.

II.

That the trial court erred in denying defendant's motion to dismiss Counts I and III of the information filed herein upon the ground and for the reason that said counts do not state facts sufficient to constitute an offense or crime against the laws of the United States.

III.

That the trial court erred over the objection and exception of the defendant in admitting the follow

ing evidence testified to by Milton O. Nelson, a witness for the government:

Q. I will ask you, Mr. Nelson, if you know the reputation of the Twelve Mile Road House or Plantation Inn, as to being a place where intoxicating liquor is commonly kept and dispensed?

* * * * *

A. Yes, sir.

Q. What is that reputation—good or bad?

A. Bad.

IV.

That the trial court erred over the objection and exception of defendant in limiting and restricting the cross-examination of said witness, Milton O. Nelson, so as to show his motive and interest in the prosecution of this case, and in permitting the prosecution to examine him as to his interest when no like opportunity was afforded the defendant.

V.

That the trial court erred over the objection and exception of the defendant in admitting the following evidence testified to by W. H. Nickell, a Government witness:

Q. Did you ever work for Fred Merrill?

A. I did.

Q. Where was it you worked for him, Mr. Nickell?

A. Twelve Mile Road House.

Q. When was it that you worked for Mr.

Merrill, if you can remember?

A. I think it was in April.

Q. Of what year?

A. 1923.

* * * * *

Q. You say you worked in April. About how many days did you work altogether, Mr. Nickell?

A. Ten or twelve days.

Q. What did you work at at the Twelve Mile Roadhouse for Mr. Merrill?

A. Worked as waiter.

* * * * *

Q. During the time you worked there, did parties come out during the night time and eat at his place?

A. Yes.

COURT: You are trying to prove now instructions given by Merrill to him?

Mr. Bynon: Yes, your Honor; also that this particular witness saw Mr. Merrill dispense liquor there and that liquor was handled there, that Mr. Merrill took part in it.

* * * * *

Q. You may state to this jury, Mr. Nickell, what instructions Mr. Merrill gave you concerning liquor, if parties should ask for liquor there.

A. Mr. Merrill instructed me to call for him.

A. What did he say about what he would do?

A. He said that he might be able to send out and get it.

* * * * *

Q. Now, can you recall an instance, or two or three or more where you did carry out those instructions?

* * * * *

A. The first bottle he sold was a bottle of cocktails. He called it cocktails, and sold it for $7.50. The next bottle he sold he sold it for $8.00. The party happened to be a friend of mine. He said, "Waiter, will you drink with me?", and I said, "Yes."

Q. Did you take some of the liquor?

A. Yes.

* * * * *

Q. Now, I will ask you if you can recall another instance when the defendant Merrill sold a bottle of liquor out there in your presence.

A. He sold another bottle, I believe, for $10 to California tourists. He also sold at the same time a dollar's worth of oranges or something.

* * * * *

Q. Now, Mr. Nickell, so much for bottles. I will ask you, while you were out there working for Mr. Merrill, can you remember instances where Mr. Merrill sold intoxicating liquor over the bar to drink?

A. We had a case out there one night . . .

Q. I can't hear you.

A. We had a case out there one night were a man was addressed as Judge. I think there was six in the party, and the dinner was a dollar and a half apiece, I believe, and the check was $44.00.

VI.

That the trial court erred over the objection and exception of the defendant in admitting in evidence a certified copy of the record of the case of State of Oregon vs. Fred T. Merrill, purporting to show that on September 6, 1910, the defendants pleaded guilty to the offense of selling liquor in quantities less than a gallon.

VII.

That the trial court erred over the objection and exception of the defendant in refusing to permit the said defendant to explain said record of conviction.

VIII.

That the trial court erred over the objection and exception of the defendant in refusing to permit proper cross-examination by defendant of Ethel V. Johnson, a witness for the Government upon matters offecting her credibility and interest in the case,

IX.

That the trial court erred over the objection and exception of the defendant in refusing to permit

the cross-examination by defendant of A. B. Gates, a Government witness, as to matters affecting his credibility and interest, to-wit: as to the place where he had refreshed his recollection by referring to his testimony given at the former trial.

X.

That the trial court erred over the objection and exception of the defendant in not requring said witness A. B. Gates to answer on cross-examination the following question:

> Q. Where did you read it? (his testimony in the former trial).

XI.

That the trial court erred over the objection and exception of the defendant in refusing to permit the cross-examination by defendant of A. B. Gates, a Government witness upon matters affecting his credibility and interest, to-wit: As to the general instructions he received for the investigation of the various road houses he raided, which included that conducted by the defendant.

XII.

That the trial court erred over the objection and exception of defendant in not requiring the said witness A. B. Gates to answer on cross-examination the following question:

> Q. All these eight road houses that you investigated, you went out with these two ladies?

XIII.

That the trial court erred over the objection and

exception of defendant in not requiring the said witness A. B. Gates to answer in cross-examination the following question:

> Q. I will ask you if it is not a fact that prior to going out to Mr. Merrill's place, you had a general discussion, at which Mrs. Johnson, Miss Meade and the Sheriff's office or some one else was present, concerning the methods that you were to use in investigating these roadhouses?

XIV.

That the trial court erred over the objection and exception of the defendant in limiting and restricting the scope of the cross-examination of A. B. Gates, a witness for the Government, he being an interested witness, upon matters affecting his credibility, motive and interest, to-wit; as to the methods employed by him in making the investigation of said road houses, said examination being necessary to show that he transported and used liquor in these investigations as a means of entrapping and inducing the owners of said road houses to violate the law.

XV.

That the trial court erred over the objection and exception of defendant in not requiring the said witness A. B. Gates to answer on cross-examination, the following question:

> Q. Is it not a fact that, during the course

of your investigation of these road houses, you did take out liquor with you which you used as the basis for swearing out a warrant of arrest against a party in whose place you brought the liquor?

XVI.

That the trial court erred over the objection and exception of defendant in not requiring the said witness A. B. Gates to answer on cross-examination the following question:

> Q. Now, I will ask you, Mr. Gates, if at any time prior to May 10th in making your investigations you had occasion to use liquor as a means of inducing violation of law?

XVII.

That the trial court erred over the objection and exception of defendant, in not requiring A. B. Gates to answer on cross-examination the following questions:

> Q. On the very first time you went out on a liquor investigation, stating that you had never taken a drink except on business, how did you at that time know the difference between the various kinds of liquor, without ever having had occasion to drink it except on business?

XVIII.

That the trial court erred over the objection and exception of defendant in not requiring the said

witness A. B. Gates to answer on cross-examination the following questions:

Q. In your examination you said you feigned intoxication for atmosphere. When did you begin to do that?

A. When I went out and hired a cab.

Q. That was atmosphere for what?

A. So I would not be detected; so that he would think that I wasn't no spotter or anything like that, or a man going out looking for no information in regards to the road houses.

Q. You wanted him not to think you were a spotter, which you were?

Mr. Stearns: If your Honor please. . . .

COURT: I will sustain the same objection to that question.

Mr. Goldstein: Save an exception.

XIX.

That the trial court erred in holding the ruling that the said witness, A. B. Gates, could not be cross-examined as to show the methods employed by him in connection with these same investigations and in refusing to allow questions of this nature to be propounded to the witness:

Mr. Goldstein: I will ask him the question, and then please may I take an exception in the record, to show the purpose of these questions and to show the methods employed by him along those similar lines I am asking him about.

COURT: At other places?

Mr. Goldstein: In connection with that particular employment.

COURT: The Court will not permit you to ask those questions. I have ruled on that once or twice. I tried to make myself plain.

Mr. Goldstein: I understand, if the Court please. I want the record to show.

COURT: You will not be permitted to go out and examine this witness as to other road houses, and what he did at those places. I might as well put a stop to that right now.

Mr. Goldstein: I am not going to pursue that any further as to this witness, only as it might affect his credibility as a witness. That is the only purpose, for the purpose of showing his motive and interest. May I have an exception to your Honor's ruling?

XX.

That the trial court erred over the objection and exception of defendant in not permitting the following cross-examination of said witness, A. B. Gates:

Q. Did you have your chicken dinner?

A. Yes, sir.

Q. How much did you pay for the dinner?

A. $3 a plate.

Q. Do you want the jury to understand that Mr. Merrill charges three dollars a plate for chicken dinners?

Mr. Stearns: It is not what he wants the jury to understand. It is what is the fact.

COURT: He has answered the question that they paid $3 a plate for it. I don't think it is necessary to inquire as to what they generally charge for these dinners.

Mr. Goldstein: You say I cannot ask him if he knew what the general charge was for a chicken dinner?

COURT: No.

Mr. Goldstein: Can I ask him why it was he paid it without protest if he knew what the general charge would be for a chicken dinner?

COURT: No, you cannot ask him that.

XXI.

That the trial court erred over the objection and exception of defendant in limiting and restricting the scope of the cross-examination of Miss Ruth Meade, a witness for the Government, as to matters affecting her credibility and for the purpose of impeachment, to-wit: as to statements she had previously made as to the nature of her instructions in the matter of making these investigations.

XXII.

That the trial court erred over the objection and exception of defendant in not requiring the said witness Miss Ruth Meade to answer on cross-examination the following question:

Q. I will ask you if it is not a fact, that during those three days investigating those

roadhouses, there were three or four times when such liquor was taken out?

XXIII.

That the court erred over the objection and exception of defendant in limiting and restricting the scope of the cross-examination of said witness, Miss Ruth Meade, as to matters affecting her credibility and interest and on refusing to allow questions for the purpose of determining the general instructions as to these investigations, as follows:

Q. Did you know you were required to play the piano for atmosphere.

A. No, I did not.

Q. You claim you did that of your own volition?

A. I did.

Q. Isn't it a fact that you played the piano in all these eight road houses?

XXIV.

That the trial court erred over the objection and exception of the defendant in not permitting the full and sufficient cross-examination by the defendant of A. B. Gates, Ethel B. Johnson, and Ruth Meade, interested witnesses, called on behalf of the Government.

XXV.

That the trial court erred over the objection and exception of defendant, in admitting the following evidence testified by Miss Martha Randall, a witness for the Government.

Q. Now, Miss Randall, you may state whether or not you knew Mrs. Johnson and Miss Meade to be reliable, responsible girls at the time that you recommended them for that mission? . . . .

A. I knew them to be reliable, respectable women.

XXVI.

That the defendant was prejudiced by the following remarks made by the Court during the examination of Miss Martha Randall, a witness for the Government.

Q. Now, with respect to the possibility of their having to drink out there . . . .

COURT: I don't think you need go into that.

Mr. Stearns: Well, perhaps not. It was brought out by the counsel.

COURT: I know it was brought out, but it is wholly immaterial.

Mr. Stearns: That is true, your Honor. It is.

Mr. Goldstein: I take exception to your Honor's remarks about that.

COURT: Well, I want to put an end to this.

XXVII.

That the trial court erred over the objection and exception of defendant in admitting the testimony of H. L. Barker, a Government witness, as to liquor alleged to have been found by him at the defendant's place on May 15th.

XXVIII.

That the trial court erred over the objection and exception of the defendant in admitting in evidence testimony of P. B. Rexford, a Government witness, as to liquor alleged to have been found by him at defendant's place, on May 15th.

XXIX.

That the trial court erred over the objection and exception of the defendant in limiting and restricting the cross-examination of said witness P. B. Rexford, as to the road houses searched by him on May 15th, the same day that the search of defendant's place was alleged to have been made.

XXX.

That the trial court erred over the objection and exception of the defendant in refusing to require Lloyd Linville, a Government witness, to answer on cross-examination the following question:

> Q. You desire to leave the inference, do you not, by that testimony, that Mrs. Merrill emptied the liquor?

XXXI.

That the court erred over the objection and exception of the defendant in refusing to admit in evidence the testimony of Ada Eades, a witness for the defendant, as to the conduct of the business of this defendant subsequent to September, 1923.

XXXII.

That the trial court erred over the objection and

exception of the defendant in refusing to admit in evidence the testimony of C. E. Carroll, a witness for the defendant, as to the general reputation of A. B. Gates, a Government witness, for truth and veracity.

XXXIII.

That the trial court erred over the objection and exception of the defendant, in limiting and restricting the testimony of Mrs. Fred T. Merrill, a witness for the defendant.

XXXIV.

That the trial court erred over the objection and exception of defendant in not permitting Russell Underwood, a witness for the defendant, to testify as to matters material to his defense, to-wit: as to instructions received by him concerning the use of liquor by his patrons.

> Q. As such waiter did you receive any instruction from Mr. Merrill concerning liquor or the use of liquor by the guests.
>
> Mr. Stearns: Just a moment, if your Honor please. If that question is confined to the time prior to Mr. Merrill's arrest, I have no objection; but if it is since then it would be a self-serving declaration, and would not be admissible, I think.
>
> Mr. Goldstein: This is prior to May 15th, which is one of the alleged acts of nuisance. He was working prior to that time. I imagine your Honor would rule I could prove anything im-

mediately prior, immediately subsequent, so long as it is close enough to the alleged occurrence of the nuisance to show how the place was being conducted.

COURT: Confine it to the 15th.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: Yes.

Mr. Goldstein: I understand the Court has ruled that I cannot show by this witness the method of conducting the place of business immediately after May 15th?

COURT: No.

XXXV.

That the trial court erred over the objection and exception of defendant in not sustaining defendant's objection to the following question propounded by the prosecution to said witness Russell Underwood.

Q. How long since you and your wife have been living together. Mr. Underwood?

XXXVI.

That the court erred over the objection and exception of defendant in not permitting E. W. Alsworth, a witness for defendant, to explain his testimony as to the good reputation of the Twelve Mile House.

XXXVII.

That the court erred over the objection and ex-

ception of defendant in not permitting J. J. Braund, a witness for the defendant, to testify as to what people said subsequent to May 10th about the reputation of defendant's place as of May 10th, as follows:

Q. Now, with whom else had you discussed the reputation of Mr. Merrill's place prior to the 3rd day of May, 1923?

COURT: The 10th day.

Mr. Goldstein: Prior to when?

Q. I should say the 10th day of May, 1923?

A. Well, I don't know as we discussed so much before that, but after he was arrested, why, there was a lot of discussion around there.

Q. We are not interested in the discussion that took place afterwards, but we are interested in the reputation at the time and prior to the time that the raid was made.

Mr. Goldstein: I object to the limitation of the question, on that ground, that he might know the reputation on or about May 10th, and it might be by reason of some conversations he might have had with the neighbors subsequent to May 10th.

COURT: I don't think that could be taken into account.

XXXVIII.

That the court erred over the objection and exception of the defendant in not requiring T. H.

Hurlburt, a Government witness, to answer on cross-examination, the following questions:

Q. Who paid his expenses, Mr. Hurlburt?

Mr. Stearns: Now, if your Honor please, this is really not cross-examination.

Mr. Goldstein: This is for the purpose of impeachment, purpose of credibility. I want to know what arrangements he had with Mr. Gates. Mr. Stearns asked him whether he had made arrangements with Mr. Gates on May 10th for the purpose of raiding roadhouses. He also asked him how long he had known Mr. Gates. I am at this time attempting to ascertain from Mr. Hurlburt whether Mr. Gates had been in his employ prior to that time, what he had been employed for, and what arrangements he made with him on May 10th. That he went into on direct examination. I believe it is open on cross-examination to determine the extent of his employment of Mr. Gates, if he was employed.

COURT: That is the very question the Court has tried to keep out of this case from the very beginning. It will not be opened up now.

Mr. Goldstein: May I ask who paid his expenses; who paid the expenses of Mr. Gates?

COURT: That is immaterial. It is not cross-examination.

XXXIX.

That the court erred over the objection and exception of defendant in not requiring said witness, T. H. Hurlburt, to answer on cross-examination the following question:

Q. Is it not a fact you employed him, (Gates), for the purpose of using him as a witness in these roadhouse cases?

Objected to.

COURT: The objection to that will be sustained. That is not cross-examination.

Mr. Goldstein: May I ask how long his employment is to continue?

Mr. Stearns: If your Honor please, it doesn't matter.

COURT: I will not permit you to pursue that.

Mr. Goldstein: May I have an exception. I think I have made it clear that I am endeavoring to ascertain certain information about the nature of his employment.

COURT: Well, you will not be permitted to ask that. He has a right to employ this man. He is not required to give his reasons for it, either.

XL.

That the trial court erred in charging the jury as follows:

"Now, the question involved in this case is a question of fact: Do you believe from the testi-

> mony beyond a reasonable doubt, that, at the time or about the time stated in the information, the defendant Merrill had possession of intoxicating liquor? If so, and you do so believe, then you should find him guilty as charged in the first count of the information."

and in failing to add that mere possession must be "possession with intent to sell."

XLI.

That the trial court erred in charging the jury as follows:

> "It is also charged that at the same time he maintained a common nuisance, that is, a place where intoxicating liquor was kept, bartered and sold. Now, a single sale, without more, would not constitute a nuisance. But if, however, a sale is made in a place fitted up for the transaction of business, and in the ordinary court of business, as if one should approach a bar in the business house, ask for and obtain intoxicating liquor from the manager or person in attendance, although there was but one purchase, it would be sufficient to justify the jury in finding that it was a common nuisance, or a place where intoxicating liquors were kept, bartered and sold."

XLII.

That the trial court erred in charging the jury as follows:

"There has been some evidence offered in the trial of this case tending to show that the establishment conducted by the defendant and known as the Twelve Mile Roadhouse, bore a common reputation as being a place where intoxicating liquor was kept and sold, and I instruct you that that is competent evidence and should be considered by you in determining whether or not the defendant is in fact guilty of maintaining a nuisance at the time and place and in the manner charged in the information."

XLIII.

That the trial court erred in charging the jury as follows:

"A subsequent raid, as you will remember by the testimony, was made upon the roadhouse of date May 15th. This you may take into consideration, and what happened and what was found there, on the question whether the defendant was maintaining a nuisance as charged, and that testimony must be considered in that light, and that is the purpose for which the Court admitted it here."

XLIV.

That the trial court erred in charging the jury as follows:

"It is also in evidence that, after these parties arrived at the roadhouse, they feigned, as one of the witnesses said, intoxication; if they

were not really intoxicated, they at least feigned intoxication. Now, if they did that, and the sale was made as claimed by the Government, it would be no defense in this case. One cannot be induced and persuaded by a Government officer to commit a crime, and then be prosecuted but a Government officer may lawfully afford an opportunity for the commission of an offense, and the testimony of the Government in this case tends to show that that is all these Government witnesses did. They went out to this roadhouse; they, as one of them said, attempted to create an atmopsere that would make it possible for them to buy liquor at that place. You may not approve of that method. It may not be the best method. I don't know. But it would be no excuse or defense for the violation of the law. It may go to the credibility of the witnesses, but if you believe that the sale was made as claimed, then it would be a violation of the statute.

XLV.

That the trial court erred in refusing to give the jury the following instructions:

"In connection with the charge against the defendant for maintaining a nuisance, where intoxicating liquor was kept or sold, I instruct you that the word "maintain" as used in the prohibition act means "continuance" and implies a certain degree of "permanence". Con-

gress by the use of the words "kept and sold" in violation of law, means either habitually or continually or recurrently so "kept and sold". In other words, a single act or a single sale is insufficient. I therefore instruct you that to constitute a nuisance, the prosecution must satisfy you by evidence beyond a reasonable doubt of the continuance and recurrence of acts or sales in violation of the law. If the evidence falls short of that required proof, your verdict should be for the defendant."

XLVI.

That the trial court erred in refusing to give the following instructions:

"The evidence in this case tends to show that Mr. Gates and his associates went upon the premises in question with their own liquor and it is contended by the defendant that they did so with the specific purpose of using their own liquor as a means of entrapping the defendant, in committing a violation of the law. I instruct you that the first duty of officers of the law is to prevent and not to punish crime and it is not their duty to incite or create crime for the sole purpose of prosecuting and punishing it. A conviction will not be sustained where the officers originate the intent and apparently join in the criminal act, first suggested by the officers merely to entrap the defendant."

XLVII.

That the trial court erred in refusing to give the following instructions:

> "Therefore, if you believe that the defendant was induced by the importunity of the officers to violate the law, that is, if he did violate it, and if through their inducement, he sold the liquor or permitted them to drink the liquor on his premises, then you should return a verdict of not guilty, as it is against the policy of the United States Courts to sanction a conviction in any case where the offense was committed through the instigation of public agents."

XLVIII.

That the trial court erred over the objection and exception of the defendant in failing and refusing to instruct the jury upon the defendant's theory of his defense in the case.

XLIX.

That the trial court erred in failing to instruct the jury that it had no right to take into consideration the testimony of Nickell, a Government witness, as proof of the specific charges set forth in the information, and that it should be strictly limited to the question as to whether or not the defendant maintained a nuisance, and for no other purpose.

L.

That the trial court erred in failing to instruct the jury that it should consider the evidence offered

by the defendant tending to show that the establishment conducted by the defendant bore a good reputation, on the question whether he was maintaining a nuisance thereat as charged in the information.

LI.

That the trial court erred in denying defendant's motion for a new trial upon the following grounds:

(a) That the Court admitted incompetent evidence offered by the Government.

(b) That the Court excluded competent evidence offered by the defendant.

(c) That the Court improperly limited and restricted the cross-examination of certain Government witnesses, to-wit: A. B. Gates, Ruth Meade, and Ethel Johnson.

(d) That the Court improperly instructed the jury to the defendant's prejudice.

(e) That the Court improperly refused to defendant's prejudice to give instructions tendered by the defendant.

(f) That the verdict was not supported by the evidence and is contrary to the law of the case.

LII.

That the trial court erred in denying defendant's motion in arrest of judgment upon the following grounds:

(a) That the information filed herein was not properly verified.

(b) That Counts I and III of the information do not state facts sufficient to constitute an offense of crime against the United States.

(c) That the verdict upon Count III is not supported by the defendant.

LIII.

That the trial court erred in rendering judgment against defendant on the verdict of this case.

Wherefore, the defendant, plaintiff in error, prays that the above and foregoing assignments of error be considered as his assignments of error upon the writ of error; and further prays that the judgment heretofore entered in this case may be reversed and held for naught and that the plaintiff in error, defendant above named, have such other and further relief as may be in conformity to law and practice of this Court.

BARNETT H. GOLDSTEIN,

E. M. MORTON,

Attorneys for Defendant and Plaintiff in Error.

Filed May 15, 1924. G. H. Marsh, Clerk.

And thereafter and on the 15th day of May, 1924, there was duly made and entered in said court and cause an

ORDER ALLOWING WRIT OF ERROR

in words and figures as follows, to-wit:

(Title)

Opon reading and filing petition of plaintiff in

error above named for an order allowing him to procure a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the District of Oregon, it appearing that defendant having filed herein the assignments of error relied upon,

It is now hereby ordered, that said petition be and the same is hereby allowed, and that a writ of error issue as in said petition prayed for and that a citation be issued and served herein.

And it is further ordered, that said writ of error operate as a supersediary and that the defendant be admitted to bail upon the penal sum of $2000, according to law, to be approved by the undersigned.

(Sgnd.) CHAS. E. WOLVERTON,
Judge.

Filed May 15, 1924. G. H. Marsh, Clerk.

And thereafter and on the 15th day of May, 1924, there was filed in said court and cause

BAIL BOND ON WRIT OF ERROR

in words and figures as follows, to-wit:

(Title)

KNOW ALL MEN BY THESE PRESENTS:

That I, Fred Merrill, as principal, and Arthur H. Johnston and Ray Barkhurst of the County of Multnomah, State of Oregon, as sureties, are by these presents firmly held and bound under the United States of America in the full sum of $2000.00, to be paid to the United States of Amer-

ica, to which payment well and truly to be made we bind ourselves, our heirs, assigns and successors, executors, and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 12th day of May, 1924.

Whereas, on the 25th day of February, 1924, at Portland, Oregon, in the District Court of the United States, for the District of Oregon, in the case pending in said court between the United States of America, Plaintiff, and Fred Merrill, Defendant, and judgment and sentence was rendered against the said Fred Merrill, and

Whereas, the said Fred Merrill has obtained a writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, directed to the District Court of the United States to reverse the judgment and sentence in said cause, and also a citation directed to the said United States of America citing and admonishing said United States of America to be and appear in said Court thirty days from and after the date of said citation, which citation has been duly served upon the United States of America.

Now, therefore, the condition of this obligation is such that if the said Fred Merrill shall appear in the United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument as required by law and by rule of said Court, and from day to day thereafter until said cause

shall be finally disposed of and shall abide by and obey the judgment and all orders made by said Circuit Court of Appeals for the Ninth Circuit in said cause and shall surrender himself in execution of said judgment and sentence appealed from as the said Court may direct if said judgment and sentence again may be affirmed, then the above obligation to be void, otherwise, to remain in full force and effect.

FRED T. MERRILL,
Principal.
ARTHUR H. JOHNSTON
Surety, residing at 1075 Cumberland Ave.
RAY BARKHURST,
Surety, residing at 548 E. 24th St. N.

State of Oregon, County of Multnomah—ss:

I, Arthur H. Johnston, and I, Ray Barkhurst, whose names are subscribed to the foregoing obligation as surety, being first duly sworn, do on oath depose and say: That I am a free holder and resident within the State of Oregon and am worth the sum of $4000.00 over and above all my just debts or liabilities, exclusive of property exempt from execution.

ARTHUR H. JOHNSTON,
RAY BARKHURST.

Subscribed and sworn to before me this 12th day of May, 1924.

B. H. GOLDSTEIN,
Notary Public for Oregon.

My Commission expires:

The foregoing bond is approved by me this 15th day of May, 1924.

(Sgnd.) CHAS. E. WOLVERTON,
Judge.

Filed May 15, 1924. G. H. Marsh, Clerk.

And thereafter and on the 9th day of January, 1925, there was duly filed in said Court an

AMENDED BILL OF EXCEPTIONS

in words and figures as follows, to-wit:

(Title)

Be it remembered, that in the November, 1923, term of the above entitled Court, to-wit: on the 11th day of January, 1924, the above entitled cause came on for trial in the above entitled Court before the Honorable Charles E. Wolverton, Judge of the said Court, and a jury duly empaneled and sworn to try the cause, plaintiff appearing by Mr. Allan Bynon and Mr. J. O. Stearns, Jr., Assistant United States Attorneys, and the defendant appearing in person and by Mr. Barnett H. Goldstein, his attorney, whereupon the following proceedings were thereupon had, to-wit:

Milton O. Nelson was called as a witness on behalf of the Government and being sworn, testified:

That he is an Editor of the "Portland Telegram" and from 1909 to 1915, and from 1920 to the date of the trial, has lived approximately two miles from the premises conducted by defendant, known as the Plantation Inn or Twelve Mile House; whereupon the following proceedings were had:

(Testimony of Milton O. Nelson)

Q. Now, I will ask you, Mr. Nelson, if you know the reputation of the Twelve Mile Road House or Plantation Inn, as to being a place where intoxicating liquor is commonly kept and dispensed?

COURT: General reputation in that community.

Mr. Stearns: Yes, that is the general reputation. That would be on or about the 10th day of May, 1923. That completes the question.

Mr. Goldstein: Now, at this time, if the Court please, I renew my objection, on the ground it is incompetent, irrelevant and immaterial, and further on the ground that the question is not properly framed as to determining the general reputation.

COURT: The objection is overruled.

Exception allowed.

A. Yes, sir.

Q. What is that reputation—good or bad?

A. Bad.

On cross-examination the following proceedings were had:

Q. Well, then, when you say his reputation in May, 1923, was bad, or rather reputation for selling liquor there, was it from anything you had learned in 1914, or 1915, or 1918, 1920, or 1921, or was it something you had learned about that time?

(Testimony of Milton O. Nelson)

A. It was common talk about there then, that he was running the house, and I knew what was going on there; that is, as from the neighbors, what the neighbors said.

Q. Were you in consultation with Mr. Christofferson, or some one in the sheriff's office, concerning this case?

A. No.

Q. At any time? Or Mr. Hurlburt?

A. You mean this case that is being tried now?

Q. Yes.

A. No, sir.

Q. Didn't you ever discuss with Mr. Hurlburt about this case?

A. Not this case.

Objected to.

COURT: I will sustain the objection.

Mr. Goldstein: I may have an exception.

Q. Is it not a fact that you urged the trial of Mr. Merrill at Gresham, before his neighbors?

Mr. Stearns: If your Honor please, I think that is also objectionable.

Mr. Goldstein: I want to show his interest.

COURT: I will sustain the objection.

Mr. Goldstein: May I have an exception to that. If I was permitted to examine the witness, I would expect the witness would testify

(Testimony of Milton O. Nelson)

that he had taken an active interest in the prosecution of this case, and also had recommended. . . .

COURT: Have you taken an interest in the prosecution of this case elsewhere than in this court?

A. No.

COURT: Well, that answers that.

Mr. Goldstein: That is all I wanted to know.

Q. Now, Mr. Nelson, how many editorials have you written about the . . . .

COURT: That is objectionable now. I think we want to get to an end some time or other in this case.

Mr. Goldstein: May I have an exception?

COURT: Yes.

Thereupon W. H. Nickell was called as a witness on behalf of the Government, and being sworn, testified:

That he was a waiter living in Portland, Oregon, and knew the defendant, whereupon the witness was asked the following questions:

Q. Did you ever work for Fred Merrill?

A. I did.

Q. Where was it you worked for him, Mr. Nickell?

A. Twelve Mile Roadhouse.

Q. When was it that you worked for Mr. Merrill, if you can remember?

(Testimony of W. H. Nickell)

A. I think it was in April.

Q. Of what year?

A. 1923.

* * * * *

Q. You say you worked in April. About how many days did you work altogether, Mr. Nickell?

A. Ten or twelve days.

Q. What did you work as at the Twelve Mile Roadhouse for Mr. Merrill?

A. Worked as a waiter.

* * * * *

Q. During the time you worked there, did parties come out during the night time and eat at his place?

A. Yes.

Whereupon the following proceedings were thereupon had:

Mr. Goldstein: Objected to as incompetent, irrelevant, and immaterial, has no connection or bearing whatsoever with the material offense in this case, which is alleged to have been committed on May 10th. This is, I understand, concerning his experience with Mr. Merrill three weeks or more prior to May 10th.

COURT: What time were you working there in April?

A. I believe it was in April, yes, sir.

COURT: The latter part of April?

(Testimony of W. H. Nickell)

A. Yes, it was about the middle or latter part of April, because I was working extra at the Waverley Golf Club at the same time, and I figured to go to work steadily at the Waverley Club the first of May.

COURT: You are trying to prove now instructions given by Merrill to him?

Mr. Bynon: Yes, your Honor; also that this particular witness saw Mr. Merrill dispense liquor there, and that liquor was handled there, that Mr. Merrill took part in it.

COURT: Objection overruled.

Mr. Goldstein: May I have an exception?

COURT: Yes.

Q. You may state to this jury, Mr. Nickell, what instructions Mr. Merrill gave you concerning liquor, if parties should ask for liquor there.

A. Mr. Merrill instructed me to call for him.

Q. Did he say about what he would do?

A. He said that he might be able to send out and get it.

* * * * *

Q. Mr. Nickell, did you carry out those instructions?

A. I did.

Q. Now, can you recall an instance, or two

(Testimony of W. H. Nickell)

or three or more, where you did carry out those instructions?

A. I can.

Q. Just tell the jury of one of these.

Mr. Goldstein: This is subject to my objection, of course?

COURT: Yes.

Mr. Goldstein: And I may have an exception?

COURT: Yes.

Q. Go ahead.

A. The first bottle he sold was a bottle of cocktails. He called it cocktails, and sold it for $7.50. The next bottle he sold he sold it for $8.00. The party happened to be a friend of mine. He said, "Waiter, will you have a drink with me?". I said, "Yes."

Q. Did you take some of the liquor?

A. Yes.

COURT: I will say to counsel the Court is admitting this testimony on account that the defendant is charged with maintaining a nuisance.

Mr. Goldstein: I object to the introduction of this testimony. I want my objection to go to the introduction of the testimony even on that ground.

COURT: Yes, very well.

(Testimony of W. H. Nickell)

The witness was further examined and testified as follows:

Q. Now, Mr. Nickell, you say that the man to whom Mr. Merrill served a bottle for $8.00 invited you to have a drink out of the bottle?

A. That is what I said exactly.

Q. Are you familiar with the taste and smell of intoxicating liquor?

A. I should be.

Q. You may state what it was that was in that bottle that you had a drink of.

A. Well, it would be very hard to tell what was in the bottle.

Q. Well, what was it?

A. Supposed to be cocktails. That is what he called it—Cocktails.

Q. I will ask you whether or not it was intoxicating liquor.

A. It was.

Q. Who delivered that bottle to the man that offered you a drink out of it?

A. Fred Merrill.

Thereafter and subject to the objection of defendant, the following questions were asked of and answers given by the witness:

Q. Now, I will ask you if you can recall another instance when the defendant Merrill sold a bottle of liquor out there in your presence.

A. He sold another bottle, I believe, for

(Testimony of W. H. Nickell)

$10.00 to California tourists. He also sold at the same time a dollar's worth of oranges or something.

* * * * *

Q. Now, Mr. Nickell, so much for bottles. I will ask you, while you were out there working for Mr. Merrill, you can remember instances where Mr. Merrill sold intoxicating liquor over the bar to drink?

A. We had a case out there one night—

Q. I can't hear you.

A. We had a case out there one night where a man was addressed as Judge. I think there were six in the party, and the dinner was a dollar and a half apiece, I believe, and the check was $44.00.

Ethel B. Johnson, called as a witness on behalf of the Government, was duly sworn and testified to the following effect: That she is at present matron of the Women's Protective Division of the City of Bend, Oregon, and held that position from the first of June, 1923; that for some time prior to the 10th day of May, 1923, she was engaged in volunteer work with the Welfare Bureau of the City of Portland, Oregon, under the direction of Miss Martha Randall, and that on the 10th day of May, 1923, at the request of Miss Randall and Thomas M. Hurlburt, Sheriff of Multnomah County, Oregon, she agreed to accompany Mr. A. B. Gates, a Federal

(Testimony of Ethel B. Johnson)

Prohibition Agent, and Miss Ruth Mead, a fellow welfare worker, in an investigation of roadhouses adjacent to the City of Portland, for the purpose of ascertaining whether violations of the National Prohibition Act were occurring in such roadhouses and for the further purpose of procuring evidence and reporting violations, if any were found to exist. That pursuant to the arrangement mentioned above she, in company with Mr. Gates and Miss Meade, entered a taxicab at the Imperial Hotel in Portland at about 11:30 on the evening of May 23rd, and that they were then driven to the Twelve Mile Roadhouse, the premises conducted by defendant Fred T. Merrill, arriving there probably a little after twelve o'clock; that while in the taxicab on the way to the Twelve Mile House, she and her companions carried on to some extent with the idea of impressing the taxicab driver that they were a party of rounders out for a good time and in order that the taxicab driver might not suspect their mission and perhaps make it impossible of fulfullment.

That after arriving at the Twelve Mile Roadhouse, she and her companions, Mr. Gates and Miss Meade, were served by Mr. Merrill over the bar of that establishment, with intoxicating liquor, for which Mr. Gates paid the defendant 50c per drink; that later on they had dinner at the Twelve Mile House and that during the course of the dinner they were served by the waiter with several drinks of in-

(Testimony of Ethel B. Johnson)

toxicating liquor, which the witness believed to be moonshine; that she tasted the drinks as they were served to her, but poured most of the liquor out when the waiter was not watching; that there were quite a number of other persons present during the evening, dancing and drinking and one man in the premises was so intoxicated that he fell down on the dance floor and that a woman entertainer, apparently under the influence of liquor, mounted the bar and sang for the entertainment of the crowd. That shortly before leaving, Mr. Gates purchased two bottles of liquor, one amber colored (moonshine), the other white (gin) at $5.00 a bottle and that Mr. Merrill delivered those two bottles to witness, the same being wrapped in newspaper. That she and her companions then entered the taxicab and were driven to their respective homes, she retaining possession of the two bottles of liquor until the following morning when she turned them over to Miss Martha Randall, Superintendent of the Welfare Bureau of Portland.

That she saw persons other than members of her own party drinking over the bar at the Twelve Mile House on the night in question.

Upon cross-examination the witness testified that there was no relationship between her and the witness Gates, but that she and Miss Meade called him 'Father' to be as silly as the rest of them, in order to play the game; that no one told them to be

(Testimony of Ethel B. Johnson)

silly, but it was done to show that they were rounders, out for a good time, that she had never been out to any roadhouse, and that it was her first experience as a detective, that she knew neither Miss Meade nor Mr. Gates prior to the night of May 10th, 1923; that her instructions were to go out and "get evidence on this house, buy moonshine if we could;" That her services were voluntarily given without expectation of reward, but that she was paid $50.00 by the sheriff for her services in investigating the different roadhouses, at the conclusion of the investigation; that they feigned a degree of intoxication on the way out and were laughing and talking, pretending that they were out for a good time.

Q. Did he, (Gates) tell you to smoke cigarettes?

A. No, and we didn't smoke them either.

Q. Did you attempt to smoke them?

A. We pretended to, yes

Q. You pretended to?

A. Yes.

Q. When did you pretend to smoke cigarettes?

A. Going out in the taxi.

Q. Who furnished the cigarettes?

A. Mr. Gates asked the driver for them.

Q. Who gave you the cigarettes?

A. The driver gave them to Mr. Gates.

(Testimony of Ethel B. Johnson)

Q. Who gave you the cigarettes?

A. Mr. Gates.

Q. What did he say to you when he handed you the cigarettes?

A. Didn't say nothing that I remember.

Q. Do you know what you were supposed to do?

A. Pretend to smoke them; pretend to be that kind of women.

Q. Pretend to be what kind of women?

A. Women who would go out at that time of night to carouse

Q. Do you mean pretend to be a bad woman?

A. No, not necessarily; but pretend to be one who would go out on a party.

Q. He didn't suggest that you should pretend in the cab, did he?

A. He didn't suggest it, no.

Q. How did you carry out the pretense of smoking?

A. Well, we tried to light them, and we bumped around in the taxi—held around in our hands a little while, finally threw them out the window.

Q. That was to impress the taxi driver?

A. It was.

That Gates was to be a cattle man, and they were to be girls out for a good time; that Gates went

(Testimony of Ethel B. Johnson)

into the bar-room at the defendant's place alone, and later took them in and ordered drinks; that the witness did not drink the first drink because she did not like it; that Miss Meade played the piano and the witness danced with everybody in the place, and mixed with them; that they left the place about three o'clock a. m.; that while there the witness tasted three or four, perhaps five, glasses, which amounts to about one full size drink, and had a chicken dinner; that Gates asked Merrill for two bottles, that they all pretended intoxication at defendant's place.

Thereupon, A. B. Gates was called as a witness for the government, and being sworn, testified that since May, 1923, he had been Deputy Sheriff of Multnomah County, and that prior to the 10th day of May, 1923, he was Federal Prohibition Agent with his office in Seattle, Washington; that he was sent here by Chief Jackson of the Seattle Prohibition Force; that he came here to investigate roadhouses and through a deputy sheriff of Multnomah County, met Mrs. Ethel Johnson and Miss Ruth Meade, who were to be his companions in the investigation.

That on the evening of the 10th day of May, 1923, he met the ladies at the Imperial Hotel in the City of Portland, called a taxicab and drove to the Twelve Mile House; that he had no intoxicating

(Testimony of A. B. Gates)

liquor with him upon that occasion; that he had not had a drink of intoxicating liquor prior to going to the roadhouse, nor observed any liquor in the taxicab on the way out; that on arrival at the Twelve Mile House they went in and the witness went to where he noticed a bar and found the defendant Merrill behind it; that after some conversation with Merrill, the defendant served him with Scotch whiskey at a charge of 50 cents. The witness testified that on the way out to the Twelve Mile House and after arriving there he feigned, to a certain extent, intoxication to let defendant know that he was out for a good time so that he would not be detected while finding out whether he could buy liquor there. The witness testified that after he had purchased the first drink he bought four gin fizzes for himself and the two girls and the taxi driver and paid defendant 50 cents a drink therefor, during which time they ate dinner, were served with several rounds of drinks, which the ladies after tasting for the purposes of identification got rid of by pouring in their water glasses or coffee cups, and generally conducted themselves as guests of the place; that one of the guests of the place was very drunk, some of the others intoxicated, and that one lady, apparently intoxicated, danced and sang upon the bar; that upon application to the defendant, his companion, Mrs. Johnson, was given two bottles of whiskey at a price of $5.00

(Testimony of A. B. Gates)

each; that they drove directly back to Portland and the witness being short of change, his companion, Mrs. Johnson, paid the taxi bill by check; that the witness retired about 4:15 a. m. and appeared at the sheriff's office at about 8:30 a. m., at which time he made a full report of his visit to defendant's place.

Upon cross-examination witness testified that he drinks only when it is necessary; that he has been a detective in the neighborhood of thirty years, working at other vocations in between times; that about four days after the raid his services were discontinued by the government and he was thereupon employed by the state as a deputy sheriff of Multnomah County; that prior to his connection with the Prohibition Force, he was employed for two years by the Anti-Saloon League as an investigator of violations of the liquor law and operated as such in various cities in the State of Oregon.

The witness further testified that he was a cook and steward by trade; that he had been variously employed as a detective by the Anti-Saloon League, and also by Theil Detective Agency, and also as deputy sheriff of Multnomah County, and as a prohibition agent for the government; that he had no employment with the sheriff at the time of the raid on the Twelve Mile House but was receiving instructions when starting out on these investigations from Hurlburt (the sheriff) and Christoffersen

(Testimony of A. B. Gates)

(chief deputy sheriff); that he received no instructions from the sheriff's office but that the two women (Mrs. Johnson and Miss Meade) were assigned to him by the sheriff's office; that on May 10th, the witness has a conversation with someone in the sheriff's employ with respect to the two women that were to go with him and was told to investigate roadhouses, whereupon the following proceedings were had:

Q. Now, were you employed by the sheriff's office prior to the time you undertook these investigations of these roadhouses?

A. On several occasions, yes, sir.

Q. What were you employed as by the sheriff?

A. As deputy.

Q. For what purpose?

A. For making liquor investigation.

Q. Liquor investigations, under cover?

A. Yes, sir.

Q. Now, when you first discussed with the sheriff about these investigations, what was the extent of your employment?

A. I was then Federal Prohibition Agent.

Q. I am asking you, please, to state what was the extent of your employment with the Sheriff's office?

A. Oh, with the sheriff. Well, I had no employment with the sheriff at that time.

(Testimony of A. B. Gates)

Q. Under whose command were you receiving instructions when you started out on these investigations?

A. Why, from Sheriff Hurlburt and Mr. Christoffersen.

Q. All right. What information or what instructions did you receive from the sheriff's office when you started out on these investigations?

A. They didn't give me any instructions.

Q. How did it happen that two women were assigned to you?

A. Why, they made that arrangement for me.

Q. Wasn't that discussed with the sheriff's office?

A. They told me they would furnish me two women, yes, sir.

Q. Well, then, there was something discussed between you and the sheriff's office as to how the investigations were to be handled?

A. No, sir.

COURT: I don't think you need go into that. It is enough that this man was employed by the sheriff to do detective work and was assigned to this matter.

Mr. Goldstein: I want to know what the employment was supposed to contemplate—whether it was supposed to contemplate taking

(Testimony of A. B. Gates)

the women out with him, or what control he had over the women.

COURT: He has already said they furnished him these two women, and I think that is enough.

Mr. Goldstein: For the purpose of the record, I will ask you this question, Mr. Gates:

Q. On May 10th, prior to going out to Mr. Merrill's place, you had a conversation with Mr. Hurlburt or Mr. Christoffersen or someone in the sheriff's employ, with respect to the two women that you were to take out with you, did you not?

A. Yes, sir.

Q. Now, at that time were you informed as to what roadhouses you were to investigate?

A. They told me to investigate the roadhouses, yes, sir.

Q. They told you to investigate eight roadhouses, did they not?

A. No, they did not.

Q. How many roadhouses were you to investigate?

A. They didn't mention the number of roadhouses.

Q. How many roadhouses did you investigate?

A. I investigated eight of them.

Q. Of all these eight roadhouses you in-

(Testimony of A. B. Gates)

vestigated pursuant to that instruction, you went out with these two ladies?

COURT: He didn't say eight roadhouses. He has already explained that. He said he went out to investigate roadhouses. I thought he said eight. Pardon me. How many roadhouses did you investigate?

Mr. Bynon: I object to this. We are still trying to try this one case. What happened at other times subsequent to this has no bearing upon the guilt of the accused.

COURT: I think you have gone far enough with that.

Mr .Goldstein: May I at least call your Honor's attention to what I have to present in the way of legal presentation of the authorities with respect to this question, because this man, as your Honor can readily recognize, is an interested witness. Mr. Gates is the prime witness in this case with respect to these counts in the indictment. He went out there for the purpose of securing, if he possibly could, violation of the liquor law. He is the interested witness for the government; and his testimony would have to be scrutinized with some particular care by the jury. Consequently his ascertainment, his power of perception, his memory, his motive, his animus, all these are matters that are vitally important for consideration of the jury.

(Testimony of A. B. Gates)

Now, I am making this statement with some authority, and I merely would like to call your Honor's attention, then your Honor may pass on it, because I want the record to show the purpose of the inquiry and the authority which I have to present—which I think it is only fair to your Honor that I present. I admit at the last trial I had not gone into these authorities sufficiently to make a proper presentation to the court. Probably it was my fault that Judge Bean would not permit me to go into these questions. Probably it was because of the nature of the question, the form of the question I propounded; probably it was because the direct examination had not been broad enough to permit me to go into the cross-examination. There may have been a thousand and one reasons why I should not have asked the witness those questions. But since that time I have gone into that and I intend also, if the court will bear with me, to connect this testimony with positive proof by one of the government's witnesses that these deliberations and arrangements had been made prior to going out to Mr. Merrill's place, which contemplated doing certain things which are allied with our theory of the defense. As I have already stated in my opening statement, I am going to prove by the defense that this man started out with liquor toward the place. He

(Testimony of A. B. Gates)

denies he took liquor out there. I want to show an arrangement and agreement that he had with the sheriff's office, prior to going out there, in certain cases for the use of liquor. Your Honor may be familiar with the rule of admission of testimony in a criminal case as stated in State vs. Mah Jim, 13 Ore. 235. Also 40 Cyc. in the interest of truth and justice, it is usual to allow considerable latitude in the examination of an adverse witness, especially where the testimony is hostile, etc.

I do feel, honestly and consciencіously, that I ought to have a right to show by this witness that not more than two days afterwards, on the same investigation of similar roadhouses, he went out with liquor to a certain place, and that he consumed liquor on the way out there, and he drank the liquor in that place, and left the empty bottle there with some of the contents, and went back and swore out a warrant against the man for the only liquor there, that had been brought by himself.

That I can prove, if I am permitted.

COURT: You will not be permitted to prove that.

Mr. Goldstein: So as to make that clear, I will ask him this question: During the course of his negotiations with the sheriff prior to going out to Mr. Merrill's place, if at that time

(Testimony of A. B. Gates)

there had not been some discussion or understanding as to the methods that he was to use in his investigation of these roadhouses.

COURT: You were instructed to make investigations of roadhouses?

A. Yes, sir.

COURT: And you went there. You were left to your own course as to what you should do?

A. Yes, sir; they didn't tell me what to do. They left that up to me.

Mr. Goldstein: I propose, if the court please, to discredit that.

COURT: Well, you will have to prove it from your own resources then.

Mr. Goldstein: I can prove that by one of their witnesses. As long as he is on the stand here, I wanted to go into that.

COURT: That is as far as you can go with this witness.

Mr. Goldstein: May I, for the purpose of the record, may I bring the stenographer aside to explain what I hope to prove?

COURT: I think I understand you fully.

Mr. Goldstein: I mean, for the purposes of the record, may I bring the court reporter aside and have the record show what I would have been permitted to prove if the court had allowed me?

(Testimony of A. B. Gates)

COURT: Not in this kind of a case. You will have to ask your questions, and then the court will determine whether it is proper or not. And then, if the court overrules it, you can state what you wish to prove.

Mr. Goldstein: I am taking exception to your Honor's ruling as to the refusal to allow me to proceed with the inquiry.

COURT: You ask your question now, and then the court will rule upon it, and then you can make your statement of what you expect to prove as to get it into the record.

Q. I will ask you if it is not a fact that prior to going out to Mr. Merrill's place you had a general discussion at which Mrs. Johnson, Miss Meade and the sheriff's office or someone else was present, concerning the methods that you were to use in investigating these road-houses.

Mr. Stearns: Now, if your Honor please, that question is objected to because the court has already ruled on it a number of times; and moreover, the witness has answered that question in the negative not only once but two or three times.

COURT: The objection will be sustained. Now you may state what you want to get into the record.

Mr. Goldstein: I take an exception. And

(Testimony of A. B. Gates)

will expect to prove, if permitted to examine this witness, I would expect to prove that an understanding and agreement was affected.

COURT: Do you expect this witness to state that?

Mr. Goldstein: I expect to discredit him.

COURT: You must state what you expect this witness to state. You cannot go out and state what you expect to prove by somebody else.

Mr. Goldstein: Maybe I will do it better in another way. I take exception to your Honor's ruling in not permitting me to ask that question.

Whereupon witness was asked the following question:

"Is it not a fact that, during the course of your investigation of these roadhouses, you did take out liquor with you which you used as the basis for swearing out a warrant of arrest against a party in whose place you brought the liquor?"

To which question objection was made and sustained and exception allowed.

Whereupon the following question was propounded to the witness:

"Now, I will ask you, Mr. Gates, if at any time prior to May 10th in making your investigations, you had occasion to use liquor as a means

(Testimony of A. B. Gates)

of inducing violations of law?"

To which question objection was made and sustained and an exception allowed.

Whereupon the following proceedings were had:

Q. Now, Mr. Gates, had you at any time been under the influence of liquor in making liquor investigations prior to this time?

A. You ask me if I have been under the influence of liquor?

Q. Yes.

A. No, sir.

Q. Had you at all times—

COURT: Is that for impeachment matter?

Mr. Goldstein: Yes.

COURT: I think the court will rule that out. You are going far afield in this matter. It will take all winter to try this case.

Mr. Goldstein: No, it won't. It is going to be very short. If I can only get the answers, it won't take very long. It takes much longer to object to these things than it does to get the information.

Q. Now, Mr. Gates, when you started out on May 10th with these two ladies, had you had an opportunity to discuss with those two ladies in company together anything they were to do either in the cab or at the Twelve Mile House?

A. No, sir. I left them at their own resources.

(Testimony of A. B. Gates)

Q. How is that?

A. No, sir.

Q. By that you mean you didn't meet the two of them together at one time, or you met them individually?

A. I mean I didn't discuss with them and tell them what they had to do. I did not.

Q. Did you at that time know that they were women that had never been out on one of these trips before?

A. No, sir.

Q. You were under the impression that they had been on trips of this kind before?

A. No, I can't say. I didn't make any impression concerning that.

Q. When you saw Miss Meade in the afternoon at her studio or at her office where she was employed in some theatrical agency, what did you discuss with her?

A. I was taken up there by Mr. Christoffersen.

Q. Please answer the question. What did you discuss with her?

A. Why, we didn't discuss anything.

Q. You said nothing at all to her?

A. I am just trying to tell you, if you will give me just half a chance. I was introduced to her and was told that she was the lady that was to go with me that evening.

(Testimony of A. B. Gates)

Q. What did you discuss with her?

A. Why, we didn't discuss anything than that she was to go to the roadhouses with me to make an investigation.

Q. You did discuss that with her then?

A. Yes, that is all, to let her know what I wanted her for.

Q. What did you say to her?

A. That is all, I have just stated.

Q. What?

A. That she was to go along, accompany me to the roadhouses.

Q. What roadhouses?

A. Why, the ones that I was going to investigate.

Q. You knew then the roadhouses you were to investigate?

A. Well, I knew of the Twelve Mile House.

Q. You knew the roadhouses you then were to investigate. Yes or no.

A. Yes.

Q. Now, what did you say to her at that time she was to do?

A. Not a thing.

Q. What did she ask you as to what she was to do?

A. She didn't ask me anything.

Q. Was anything said about her having to drink liquor?

(Testimony of A. B. Gates)

A. No, sir.

Q. Well, did you know at that time that these ladies were to go out there with a view of trying to get a drink, if they could.

A. Certainly I knew it.

Q. Did you know whether or not the women had, prior to that time, never taken a drink before?

A. I didn't know.

Q. Did you ask them?

A. No, sir.

Q. Did you know whether these girls had never been to these roadhouses before?

A. No, sir.

Q. Did you ask them?

A. No, sir.

Q. Did you know whether these girls were accustomed to smoking?

A. No, sir.

Q. Did you ask them?

A. No, sir.

Q. Did they ask you anything at all?

A. No, sir.

Q. Did you tell them anything at all?

A. No, sir.

Q. And all you said that afternoon when you went down there with the sheriff, Christoffersen, was that she was to go with you to these roadhouses?

(Testimony of A. B. Gates)

A. Yes, sir.

Q. And that was all the conversation you had?

A. Yes, sir.

Q. All right. Then when you met Mrs. Johnson outside the sheriff's office in the automobile, what did you say to her?

A. Well, Mr. Christoffersen introduced me.

Q. What did you say to her?

A. Well, I will be away ahead of my story.

Q. I don't want the entire story, unless counsel wants it.

A. I didn't say anything to her.

Q. Did she say anything to you?

A. No, sir.

Q. So you never addressed one word to her?

A. Well, Mr. Christoffersen—

Q. Did you ever?

Mr. Goldstein: I understand. I simply asked him. Did you say anything to her, her personally. Let me repeat it again. Mr. Gates, take your time, think it over. What, if anything, did you say to Mrs. Johnson outside the sheriff's office, when you were introduced to her by Mr. Christoffersen?

A. Well, she was a perfect stranger to me at that time. I was introduced to Mrs. Johnson by Mr. Christoffersen. Mr. Christoffersen says, "This is the lady that is going to accompany

(Testimony of A. B. Gates)

you to the roadhouse tonight." And he says, "You can set the time that you want her to meet you, and where."

COURT: Then what did you say to her?

A. I told her to meet me at the Imperial Hotel somewhere around eleven o'clock. That was all that was said to her.

Q. You said absolutely nothing else to her?

A. No, sir.

Q. Did you tell her what she was to wear, or what she was to do?

A. No, sir.

Q. Did Mr. Christoffersen tell her in your presence?

A. No, sir, not that I know of.

Q. Now, at what time did you meet these two girls?

A. Oh, approximately eleven-thirty. One was there a little ahead of the other.

Q. Where did you meet them?

A. I met them at the Imperial Hotel.

Q. Where were they—in the lobby?

A. Yes, sir, in the ladies' rest room.

Q. Did you have an opportunity to talk with them there awaiting the cab?

A. I had an opportunity to talk to them, but we didn't talk about the case any.

Q. I have not come to that yet. You had the opportunity to talk with them, and you said nothing to them?

(Testimony of A. B. Gates)

A. I told them we was going out to the Twelve Mile House, and was going to see if there was any liquor violations there.

Q. You told them then for the first time that you were going to see if there were any liquor violations there?

A. Yes, sir.

Q. Did you tell them to bring any liquor back with them?

A. No, sir.

Q. You never told that to Mrs. Johnson?

A. Not at that time.

Q. When did you tell her, if at any time?

A. Not until we got into the roadhouse and was ready to come away.

Q. Now, then, you never said to Mrs. Johnson at any time until you got into the roadhouse about the necessity of her taking any liquor away from that place? Is that true or not true?

A. I don't remember whether I ever told her it was necessary or not. I know we was going to go out there and bring some back if possible, that would be sold to us.

Q. That is, you knew you were going to do that. I am trying to find out whether you at any time prior to entering into the roadhouse ever told Mrs. Johnson or Miss Meade about taking liquor from the place.

(Testimony of A. B. Gates)

A. No, I don't believe I did.

Q. You don't believe you did?

A. No, sir.

Q. Did they at any time prior to coming into the roadhouse ask you about the necessity of taking liquor from the place?

A. No, sir; not that I know of.

Q. They did not. Did you tell them prior to entering the taxicab that it was necessary for them to feign intoxication?

A. No, sir.

Q. Then it was a matter of surprise to you when they feigned intoxication in the taxicab?

A. No, it didn't surprise me.

Q. You stated in your direct examination, I believe, you feigned intoxication before you got in the taxicab.

A. Yes, when I stepped out on the sidewalk and went to the cab.

Q. By feigning intoxication on the sidewalk before getting into the cab you mean by staggering?

A. No, I didn't stagger very much; no, sir.

Q. What did you do?

A. Well, same as anybody that would—

Q. I don't know what anybody else would do. I am asking you about what you did.

Mr. Stearns: He is answering the question. Let him answer, please.

(Testimony of A. B. Gates)

A. When I went and hired the cab to drive up outside, I walked up to the driver and asked him about the chances of getting that cab, and if it was engaged. I told him I had a party that wanted to go out—

Q. I asked you what you did about feigning intoxication on the sidewalk before getting into the cab?

A. I kind of made him think, believe I had been drinking, something like that.

Q. What did you do on the sidewalk, prior to getting into the cab?

A. I didn't do very much of anything, except walk right out and walk back in, got the ladies after I had the cab engaged.

Q. You said you acted so as to give the impression that you were drunk or under the influence of drink.

A. Yes, sir. I stood in front of the driver, I might sway a little bit, and then turned around and walked away.

Q. You swayed a little bit?

A. Yes, sir.

Q. Instead of staggering, you swayed?

A. I had to be careful about staggering around in a crowd like that in front of the hotel.

Q. Did these girls also sway in getting into the cab?

(Testimony of A. B. Gates)

A. Not that I know of, or noticed.

Q. When you got into the cab you continued your pretense of intoxication?

A. Yes, to a certain extent.

Q. Just explain what you mean, to a certain extent.

* * * * *

A. Well, it would not really be necessary to feign very much in the cab.

Mr. Goldstein: I submit, if the court please, the witness should not argue with me.

COURT: Answer the question. Then make your explanation.

A. No, I didn't very much of any kind.

Q. What did you do?

A. I sat down in the cab, and sat there same as anyone else would, and talked to the girls. I certainly did, yes.

Q. You said you feigned intoxication to a little extent. Now that is not any intoxication —talking to the girls. Did you talk loud in a boisterous manner?

A. No, sir.

Q. Well, then, how did you feign intoxication?

A. Well, that is the only way I did, if that meant anything.

Q. When did you tell him you were a cattle man and from Eastern Oregon?

A. Tell who?

Q. The driver.

(Testimony of A. B. Gates)

A. I don't remember I ever told him, unless he heard it into Merrill's place. I told Mr. Merrill.

Q. You didn't tell it at all on the way out?

A. No, sir; I didn't engage in no conversation.

Q. During the ride out there, didn't you talk to the girls loud, so that he might hear as to what your plans were?

A. No, I didn't talk—ordinary tone.

Q. Then you were not feigning intoxication at all in the cab from what you state now?

A. Well, as I said, it would not be necessary for me, because I was in the back seat there, and why should I perform when it was dark in the car, and the driver was facing the front of the road, so he could see where he was driving to? He would not have seen anything anyway.

Q. In your examination you said you feigned intoxication for atmosphere. When did you begin to do that?

A. When I went out and hired the cab.

Q. That was atmosphere for what?

A. So I would not be detected; so that he would think that I wasn't no spotter or anything like that, or a man going out looking for no information in regards to the roadhouses.

Q. You wanted him not to think you were a spotter, which you were.

(Testimony of A. B. Gates)

Mr. Stearns: If your Honor please—

COURT: I will sustain the same objections to that question.

Mr. Goldstein: Save an exception.

Q. When you got to the Twelve Mile House did you all get out together?

A. Yes, sir.

Q. Isn't it a fact that the driver got there first and opened the door, and then called you people?

A. No, sir.

Q. That is not a fact?

A. No, sir.

Q. Now, when you got in, you say you immediately went into the bar room?

A. No, sir.

Q. What did you do?

A. We entered into the reception room as we went in, and I asked for a private dining room.

Q. For what?

A. For to have something to eat.

Q. Chicken dinners?

A. Yes, sir.

Q. You knew they made a specialty of chicken dinners out there?

Mr. Bynon: If your Honor please, that question has been asked three times now.

Court: You may answer it again.

(Testimony of A. B. Gates)

A. Yes, sir.

Q. Now, after you got in, you said you first went into the reception room?

A. The reception room.

Q. Then you went into the bar room yourself? Is that right?

A. I went into the dining room first with my party, in a private dining room.

Q. Then what?

A. Then I happened to look around the room and seen a door open there, and I seen a bar through the door. I said, "I see something. I am going out." And I went out and saw Mr. Merrill behind the bar.

Q. Was anybody there at that time?

A. There might have been somebody.

Q. I am asking you, please, was there anybody there?

A. There was some other parties in the room, yes, sir.

Q. Did you see another taxi driver there?

A. There might have been another driver there.

Q. Didn't you, as soon as you arrived at the place, take out a bottle from your pocket and flourish it in the air?

A. No, sir.

Q. You didn't do that?

A. No, sir.

(Testimony of A. B. Gates)

Q. You might have done it on other occasions?

Objected to.

COURT: I have already ruled on that.

Mr. Goldstein: I will ask him the question, and then, please, may I take an exception in the record, to show the purpose of these questions and to show the methods employed by him along those similar lines I am asking him about?

COURT: At the other places?

Mr. Goldstein: In connection with that particular employment.

COURT: The court will not permit you to ask those questions. I have ruled on that once or twice. I tried to make myself plain.

Mr. Goldstein: I understand, if the court please. I want the record to show.

COURT: You will not be permitted in this case to go out and examine this witness as to other roadhouses, and what he did at those places. I might as well put a stop to that right now.

Mr. Goldstein: I am not going to pursue that any further as to this witness, only as it might affect his credibility as a witness. That is the only purpose, for the purpose of showing his motive and interest. May I have an exception to your Honor's ruling?

COURT: You may have your exception.

(Testimony of A. B. Gates)

You are always entitled to that. You may always have it in this court.

Q. Now, when you asked him for a drink, was anybody present?

A. There were others around in the room, yes, sir.

Q. Do you know who they were?

A. No, sir.

Q. Did you make any effort to find out?

A. No, sir.

Q. You made no effort to find out?

A. No, sir.

Q. When you went into that room, did you stagger?

A. No.

Q. Did you sway?

A. I might have took an extra step or so, and kind of move around as if I had had a drink or two.

Q. Did you see any indication of any liquor being drunk in that room when you came in?

A. No, sir.

Q. Was there any liquor being served so far as you could see in that room when you first came in?

A. No, sir.

Q. And then you going in there and taking an extra step, as you said, started out with

(Testimony of A. B. Gates)

the same question, "Can I get anything to drink here?

A. No, sir, I didn't say that.

Q. What did you say?

A. I said, "How is chances to get a drink of Scotch whiskey?"

Q. Mr. Merrill said there was no chance?

A. He said, "I don't think so."

Q. Then it was you began telling him a story about your being a cattle man?

A. He commenced asking me where I was from and who I was.

Q. Did you flash a roll of bills?

A. No, sir.

Q. Did you tell him about the cattle that you had just brought into town?

A. No, I don't remember about telling him of bringing any cattle in.

Q. Well, did you say you had just sold a load, or something of that kind?

A. No, I told him I was a cattle man, after he asked me who I was and where I was from. I told him I was from Eastern Oregon.

Q. Did you say something about being tired of stockyard whiskey?

A. No, sir.

Q. Never mentioned the term?

A. No, sir.

Q. Now, was there anything said about

(Testimony of A. B. Gates)

Miss Meade playing the piano to entertain the guests?

A. No, sir.

Q. Was there anything said about Mrs. Johnson dancing with the guests?

A. No, sir.

Q. The fact is, Miss Meade did play the piano?

A. She did.

Q. Mrs. Johnson did dance with the guests?

A. Yes, sir.

Q. And you carried on rather boisterously?

A. No, sir.

Q. What did you do?

A. Why, I danced and talked to other parties around there, yes, sir.

Q. Didn't you carry on your pretense of intoxication?

A. To a certain extent, yes, but never stepped out of my way, or out of my place.

Q. Did you offer drinks to women folks there?

A. I didn't offer anybody a drink.

Q. Didn't you offer anybody a drink?

A. In what way? I would like to know what way do you mean?

Q. I thought you stated in your direct examination you invited some other people there to have drinks?

(Testimony of A. B. Gates)

A. I did after they got acquainted with us. When I stepped up to the bar to buy a drink these other parties were there. I asked them to have a drink with us.

Q. I asked you a few seconds ago, did you offer any women folks a drink?

A. I didn't offer them in particular. I thought maybe you meant that I had a glass in my hand and offered them. I asked that party if they would have a drink.

Q. Were there women folks in the party?

A. There was two women folks in that party.

Q. You offered the women folks a drink?

A. I asked the gentleman if his party would have a drink. I didn't ask the women folks direct, no sir.

Q. You knew the women were drinking in that party?

A. Yes, sir.

Q. You knew your own women were drinking?

A. I had been buying drinks for them, yes.

Q. You came out there for the purpose of drinking, and taking drinks away from there?

A. Yes.

Q. You said that the first time drink was offered, Mrs. Johnson and Miss Meade refused to take any?

(Testimony of A. B. Gates)

A. They refused to take any? No, they didn't refuse to take it.

Q. Didn't you state yesterday that Mrs. Johnson refused to take a drink when it was offered to her because she claimed it was too fuzzy, it was too mixed, or something of that kind? Didn't you state that yesterday afternoon?

A. That mixed drink, yes sir.

Q. Didn't you state that yesterday afternoon that Mrs. Johnson refused to drink because it was fuzzy, or it was too mixed—yes or no?

A. It was too much of a mixed drink, she didn't want it.

Q. Will you answer that question, yes or no?

A. I am answering it, yes, sir.

Q. Then counsel is mistaken when he says you didn't say that?

A. You get me tangled up so it is hard for me to answer that question for you.

Q. Now, Mr. Gates, when was it you suggested to Mrs. Johnson that she should ask for some liquor to take home?

A. I don't remember ever telling her that —to ask for liquor.

Q. When was it that you discussed with her about asking, if at any time?

(Testimony of A. B. Gates)

A. I don't remember discussing it.

Q. So you never had any conversation, then, with Mrs. Johnson or she with you about asking to take any liquor home?

A. I had told her that I was going to try to get some liquor to take home with me, yes.

Q. When did you discuss that with her?

A. Why, I don't just remember what time it was. It was through the course of the evening. It was before we was ready to go home—something like that.

Q. And then Mrs. Johnson had nothing to do with the two bottles that you ordered from Mr. Merrill?

A. I had ordered them.

Q. Please answer the question. Then Mrs. Johnson had nothing to do with the ordering of the two bottles from Mr. Merrill?

COURT: He was over that yesterday, under your cross-examination. I don't think you need to take time with it.

Q. Did you have your chicken dinner?

A. Yes, sir.

Q. How much did you pay for the dinner?

A. $3.00 a plate.

Q. $3.00 a plate?

A. Yes, sir.

Q. Do you want the jury to understand that

(Testimony of A. B. Gates)

Mr. Merrill charges three dollars a plate for chicken dinners?

Mr. Stearns: It is not what he wants the jury to understand. It is what is the fact.

COURT: He has answered the question that they paid $3.00 a plate for it. I don't think it is necessary to inquire as to what they generally charge for these dinners.

Mr. Goldstein: You say I cannot ask him if he knows what the general charge is for a chicken dinner?

COURT: No.

Mr. Goldstein: Can I ask him why it was he paid it without protest, if he knew what the general charge would be for a chicken dinner?

COURT: No, you cannot ask him that.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: You may have your exception.

Q. Why did you invite the taxi driver in with you?

A. Well, I knew we would be in there for some time, and I didn't care to have the man stand outside. Thinking he might be hungry along about midnight, so for courtesy I asked him in.

Q. Did you offer him any drinks?

A. I offered him a gin fizz.

Q. Did he drink any?

(Testimony of A. B. Gates)

A. I believe he did, yes.

Q. Was he under the influence when he was driving you home?

A. No, sir.

Q. Now, how long did you say you remained there?

A. Oh, somewhere around three o'clock.

Q. And you don't know what time you arrived in town?

A. Yes, it was something after three o'clock —three-thirty; somewhere around there.

COURT: You have been all over that, Mr. Goldstein.

Q. Now, you went out there for the sole purpose of securing a liquor violation, if you could? Is that right?

Mr. Stearns: If your Honor please, he was not out there for the purpose of securing a liquor violation. But he was out there for the purpose of determining whether the liquor law was being violated there, and he so testified.

COURT: Yes, that has been testified to.

Q. When Mrs. Johnson and Miss Meade wouldn't take the first drink, did you admonish them that their business there was to drink?

A. No, sir.

Q. Did you ask them then if they did drink?

A. No, sir.

(Testimony of A. B. Gates)

Q. You were not surprised then about their not drinking?

A. No.

Q. Now, when was it that the girls began calling you father?

A. I don't know.

Q. Did they call you father?

A. I believe Mrs. Johnson once or twice called me father. As far as I was concerned, I didn't pay any attention to that. That is natural—girls might do that any time when they are out.

Q. Girls might do that any time when they are out?

A. Yes, any party. I don't mean particularly my party. But any party that might go out for a good time, anything like that, going out for a good time, any such things as that, they might call me father, such as that.

Q. Now, you were the man that swore out the warrant for Mr. Merrill's arrest? Is that right?

A. Yes, sir.

Q. You were the man that made the affidavit for the search warrant that was issued?

A. Yes, sir.

Q. You were the man that claims he never takes a drink outside of business?

Mr. Stearns: If you Honor please, that is argumentative,

(Testimony of A. B. Gates)

COURT: What is your answer to that?

A. Yes, sir.

Q. Now, Mr. Gates, you have been on liquor investigations for how many years?

COURT: You have been all over that.

Mr. Goldstein: Just one point.

COURT: I think we better put a stop to that now, because he has been over that.

Mr. Goldstein: He says he never took a drink outside of business. Now, I want to find out—

COURT: You have been all over that question. There is no use taking up further time of this court with it.

Mr. Goldstein: May I ask one question?

COURT: You may ask one question to get it into the record.

Q. On the very first time you went out on a liquor investigation, stating that you had never taken a drink except on business, how did you at that time know the difference between the various kinds of liquor, without ever having had occasion to drink it except on business?

Mr. Stearns: If your Honor please, that question is objected to as incompetent.

Objection sustained.

Mr. Goldstein: May I have an exception?

Court: Yes.

(Testimony of A. B. Gates)

Q. Under what different assumed names did you operate?

A. Johnson.

Q. Did you ever go under an assumed name, by the name of Coffey?

A. No, sir.

Q. Isn't it a fact that that was the name you went under at the Imperial Hotel?

A. No, sir.

Q. And signed checks under that name?

A. No, sir. Furthermore, I never stopped at the Imperial Hotel in all my life, that is to register there.

Q. Well, I will ask you if you are not the same man that registered at the Imperial Hotel, room 509, October 23, 1923, under the name of C. C. Coffey, and you were ejected from that house?

Mr. Stearns: That question, if your Honor please, would be objectionable, because it occurred since the date of the offenses in question. However, I don't particularly object to the witness answering it.

A. No, sir, I never have, because I have never registered in that hotel.

Q. Under that assumed name?

A. Or any other name.

Q. And you were ejected from that hotel?

COURT: What time does that refer to?

(Testimony of A. B. Gates)

Mr. Goldstein: October 23, 1923.

COURT: After this transaction?

Mr. Goldstein: Yes.

COURT: The objection will be sustained.

Mr. Goldstein: May I have an exception? I think that is all.

Thereupon, Miss Ruth Meade was called as a witness for plaintiff and after being sworn, testified that she was an organist and was part owner of the Juhasz Amusement Co., playing at moving picture houses in Portland, Oregon; that she was acquainted with Miss Martha Randall, matron of the Women's Protective Division, and sometimes voluntarily assisted her in her work, and that on the 10th day of May, 1923, she agreed with Miss Randall to accompany A. B. Gates and Mrs. Ethel Johnson, for the purpose of finding out whether certain roadhouses were violating the prohibition law; that they met Mrs. Johnson at the Imperial Hotel on the evening of the same day, and went in a taxicab to the Twelve Mile House. Witness testified that the driver of the taxi was on the left hand side, that she sat immediately behind him and that the window in front of her and between her and the taxi driver was closed and the one on the other side open. That she was in a position to know that there was no liquor in the taxicab and that none of the party had been drinking.

On arriving at the Twelve Mile House they were

(Testimony of Miss Ruth Meade)

met by a waiter and relieved of their wraps and went into the bar and were served with fuzzy drinks called gin fizzes by Mr. Merrill, which they did not drink; that the witness played the piano, ate a chicken dinner, was served with liquor and Mr. Gates bought drinks for the crowd. That on leaving, they purchased two bottles of liquor from Merrill and brought it with them.

On cross-examination the following proceedings were had:

A. Miss Meade, did you see with your own eyes these two bottles prior to seeing them in Miss Randall's office?

A. I saw them in the taxi.

Q. Were they open?

A. No, they were not.

Q. They were wrapped up in newspaper?

A. Yes, sir, they were.

Q. Well, then, how can you testify that you saw those two bottles in the taxi, when they were wrapped up?

A. Because I had taken Miss Randall's and Mr. Gates' word that they were the same bottles.

Q. How?

A. I know the two bottles that were put into our taxi.

Q. Miss Meade, you didn't have possession of those two bottles, did you?

(Testimony of Miss Ruth Meade)

A. I didn't, no, sir.

Q. They were wrapped in a newspaper?

A. They were.

Q. And they were taken by Mrs. Johnson.

A. Yes.

Q. And it was she who brought them to Miss Randall's, if she brought any liquor at all?

A. She did.

Q. Now, you didn't see those two bottles with your own eyes?

A. I knew they were buying them to take.

Q. Please answer—did you see those two bottles with your own eyes?

A. Unwrapped? Did I see them unwrapped or wrapped?

Q. Could you see them through the newspaper?

A. Well, I knew what they were.

Q. Well, could you see them through the newspaper?

A. No, I could not.

Q. Were you feigning intoxication, too?

A. Partly, yes.

Q. And how—to what extent?

A. Well, I mingled with the people that were there.

Q. How?

A. I mingled with the people that were there.

(Testimony of Miss Ruth Meade)

Q. Is that what you call feigning intoxication—mingling?

A. Well, I was jolly.

Q. Well, how jolly?

A. I don't know how jolly. I was laughing and talking.

Q. Is that feigning intoxication—laughing?

A. I wasn't feigning drunkenness, if that is what you mean.

Q. Did you feign intoxication? Did you or did you not?

A. Well, to a certain extent. I didn't feign drunkenness.

Q. What do you mean by intoxication? Don't you mean by that drunkenness?

A. I do to a certain extent, yes.

Q. Did you or did you not feign intoxication?

A. Partly, yes.

Q. Partly—what do you mean by that?

A. I mean that I was laughing and talking.

Q. Why were you playing the piano?

A. Well, that to me was natural, and I had to do something.

Q. Well, isn't it a fact that you testified at the last trial that you played for atmosphere?

A. It is, I believe.

Q. Well, did you or did you not so testify?

(Testimony of Miss Ruth Meade)

A. I believe I did, yes.

Q. Well, then, if you played for atmosphere, you played for a purpose, did you not?

A. I did.

Q. Now, then, if you played for a purpose, what was that purpose?

A. I was out there to get evidence, if the law was being violated, and that was my purpose.

Q. What was your purpose in playing the piano?

Mr. Stearns: If your Honor please, she has already testified what her purpose was.

COURT: Answer the question.

A. My purpose was, it was as easy, if not easier, for me to play the piano, as it was to dance.

Q. But you testified that you played for atmosphere, which is a little different from playing because it is easier to play, and you played for a purpose. Now, why did you play for a purpose?

A. Well, I played for a purpose, because playing the piano gave the atmosphere, or gave the idea that I was jolly.

Q. That is it? Well now, how long did you play during the course of the evening?

A. I don't know how long I played. Perhaps half of the time.

(Testimony of Miss Ruth Meade)

Q. Half of the time. And as a matter of fact you are an entertainer?

A. No, I am not.

Q. Don't you go out with the Juhasz Amusement Company to play for their theatrical acts?

A. I play for their vaudeville acts.

Q. You are then connected with some vaudeville association?

A. No, sir. I happen to own part of that company.

Q. But you play with their acts?

A. I merely accompany the acts as accompanist.

Q. But you go out with their acts?

A. I do, if it is necessary.

Q. So when you say you played for atmosphere, that is a theatrical expression, is it not?

Mr. Stearns: Objected to.

A. Not altogether, no, sir.

Q. Is it or is it not a theatrical expression?

COURT: The objection is sustained.

Mr. Goldstein: May I have an exception?

Q. In the afternoon of May 10th you say you saw Mr. Gates?

A. Yes, I did.

Q. Did you or did you not meet Mrs. Johnson in the afternoon?

A. I met Mrs. Johnson at the Imperial Hotel.

(Testimony of Miss Ruth Meade)

Q. Please answer the question. Did you or did you not meet Mrs. Johnson in the afternoon?

A. I did not.

Q. Isn't it a fact you met Mrs. Johnson, Mr. Gates and Sheriff Hurlburt in the afternoon?

A. Of what day?

Q. Of May 10th.

A. I don't remember, no.

Q. Would you say you did not?

A. I wouldn't say I did not, no.

Q. Well, you just stated positively—

A. I met Mrs. Johnson that night.

Q. That you didn't see Mrs. Johnson until eleven o'clock at the Imperial Hotel. Now, what is the fact?

A. I saw Mrs. Johnson at eleven o'clock at the Imperial Hotel.

Q. Would you say you didn't see her in the afternoon?

A. I say yes.

Q. You didn't see her?

A. I did not, no, sir.

Q. Isn't it a fact there were arrangements made as to what you were to do at these roadhouses, in the afternoon of May 10th?

A. Yes, there were arrangements made, yes.

(Testimony of Miss Ruth Meade)

Q. Who made the arrangements?

A. Mr. Christoffersen gave them to Mr. Gates and told me what they expected.

Q. Where was this conversation you had?

A. Mr. Gates and Mr. Christoffersen were in the studio, in my office.

Q. What did Mr. Gates tell you, if anything, then?

A. Mr. Christoffersen told us we were to go out, and if the law was being violated, to get the evidence.

Q. What else did he say?

A. That is all.

Q. Nothing else was said.

A. Not that I remember.

Q. Wasn't there anything said about whether it was necessary to drink liquor?

A. It was surely necessary, yes, to take it, if it was there.

Q. I beg you, please, Miss Meade, to answer the question: Was anything said about the necessity of drinking liquor?

A. No, there was nothing said about that.

Q. Was there anything said about the necessity of taking liquor if any could be secured?

A. Of buying it, do you mean?

Q. Yes.

A. Absolutely.

Q. Well, I asked you what was the conver-

(Testimony of Miss Ruth Meade)

sation Mr. Christoffersen had with Mr. Gates or you, and you said all he said was, if there was any violation, to find out. Now what were the facts?

A. If they were selling liquor out there, to obtain evidence.

Q. What did he say as to how you were to go out there, what you were to do.

A. He didn't say.

Q. Nothing was said.

A. Not that I remember.

Q. At that time wasn't there a discussion as to the roadhouses you were to see?

A. In what way do you mean?

Q. As to what roadhouses you were to go to?

A. There may have been, yes.

Q. Was there or was there not?

A. I don't remember all the conversation at that time.

And the following testimony of said witness:

COURT: You are asking that question.

Q. Now, I will ask you, Miss Meade, whether or not you gave that testimony, as I read it to you, at that time and under those circumstances.

A. If I gave that testimony I was mistaken in the date that you asked me when I was in Sheriff Hurlburt's office.

(Testimony of Miss Ruth Meade)

Q. Will you please answer the question? Did you give the testimony as I read it to you?

A. I must have, if you have it written.

COURT: But you say now you were mistaken?

A. If I gave that testimony I was mistaken in the date asked me that I was in his office at the time.

Q. Your memory was much more refreshed at that time than it is now, was it not?

Mr. Stearns: That question is objected to. She has already stated, if she said it was on the 10th she had the conversation she was mistaken.

COURT: That is argumentative.

Mr. Goldstein: May I have an exception?

COURT: Yes.

Q. Have you discussed this case since the last trial with anyone in the United States Attorney's office?

A. Which case?

Q. I am talking about the Merrill trial, since the trial last July.

A. I have, yes.

Q. With whom have you discussed it?

A. Mr. Stearns.

Q. Who else?

A. Mr. Stearns alone.

Q. How many times did you discuss it with him?

(Testimony of Miss Ruth Meade)

A. Twice.

Q. And when were these two times?

A. I don't remember just when they were.

Q. How long ago?

A. They were perhaps the date that the trial was called for, I came up to the office.

Q. December 19th?

A. Yes.

Q. When was the last time?

A. I don't remember. It has been several days ago.

Q. Several days ago?

A. Yes, it has.

Q. At the time you discussed it with him was anybody else present?

A. No, sir.

Q. Did you read your transcript?

A. I did, yes.

Q. Did you suggest it?

A. No, I did not.

Q. He suggested it to you?

A. Yes, he did.

Q. What did he say to you about that?

A. Well, he spoke that he would want to go over it with me, and I consented—that I wanted to myself.

Q. Did you take it home with you?

A. I did not.

Q. Did you read it in his office?

(Testimony of Miss Ruth Meade)

A. I did.

Q. Did you discuss the case with him as you read it?

A. I did.

Q. Now, Miss Meade, I will ask you if it is not a fact that you did receive instructions as to all these roadhouses at one time, prior to going out to Merrill's roadhouse? Did you? Yes or no.

A. I don't know just what you mean.

Q. I will ask you whether or not it is not a fact that you received definite instructions as to all these roadhouses prior to going out to Merrill's place.

A. No, not about all of them.

Q. About how many of them?

A. I don't know.

Mr. Stearns: If your Honor please, I don't see that that is in this case particularly.

A. May I say this? I wish to say this: That those cases were not all discussed any one certain time or any certain place.

COURT: You talked about them several times with the officers?

A. Yes, sir.

COURT: As you went from place to place you talked about them?

A. Yes, there was no outline definitely given us.

(Testimony of Miss Ruth Meade)

Q. Was a discussion had as to any particular number of roadhouses prior to going out to Mr. Merrill's place?

A. No, there was not.

Q. I will ask you what you got paid for your work?

A. For what work?

Q. For your work in helping the prohibition agent.

Mr. Stearns: You mean in the Merrill case?

Mr. Goldstein: In the Merrill case.

A. There was no special remuneration for the Merrill case.

Q. Will you please answer my question?

A. There was remuneration for all of them.

Q. What did you get paid? Please answer my question.

A. Do you want just exactly how much it would figure?

Q. No, how much did you get paid?

A. I got paid a lump sum for all of them.

Q. How much did you get?

A. I got $50.00.

Q. For how many?

A. Eight cases.

Q. What was the time within which you investigated these eight cases? How many days?

A. It covered a period—it began on the

(Testimony of Miss Ruth Meade)

10th, and I believe the 10th was on Friday, Thursday or Friday—I don't remember just the exact day—

Q. I don't care about that.

A. And I think the last night was Monday night. We didn't go out Sunday night.

Q. In other words, you investigated these eight cases in three days?

A. Yes, we did.

Q. You stated, I believe, that there was no liquor taken by Mr. Gates in the taxicab on the way out?

A. There was not.

Q. I will ask you if it is not a fact, that, during those three days investigating those roadhouses, there were three or four times when such liquor was taken out.

Mr. Stearns: Just a moment.

COURT: The objections will be sustained to that.

Mr. Goldstein: May I have an exception?

COURT: Yes.

Q. Now, do you recall anything said, when you left Mr. Merrill's place, about taking liquor home?

A. What do you mean? When?

Q. When you left Mr. Merrill's. You only went there once?

(Testimony of Miss Ruth Meade)

A. You mean, before we left it, during the evening, or after we left it?

Q. As you left Mr. Merrill's.

A. After we left it—I remember as we left, I knew they were going to get some—I know that, as we left it, that Mrs. Johnson had gone out first, and I know that when we got into the cab he asked us if the liquor was in the cab.

Q. Did you hear anybody ask Mr. Merrill? for any liquor to take with them?

A. Not at the time; no, I did not.

Q. Did you hear Mr. Gates ask him?

A. I don't think I did.

Q. So you didn't hear any conversation, then, between Mr. Gates or Mrs. Johnson and Mr. Merrill about taking any liquor from the place?

A. No, I did not.

Q. How?

A. I did not.

Q. And you didn't see any liquor pass between Mr. Merrill and Mr. Gates or Mrs. Johnson?

A. I did.

Q. When was that?

A. The drink that was served.

Q. I am talking about these bottles now.

A. No, I did not.

Q. You didn't see any bottles passed?

A. No.

(Testimony of Miss Ruth Meade)

Q. Now, did you feign intoxication on the way out to Mr. Merrill's place?

A. Just the same as I did when I was there, to a certain extent.

Q. Please answer the question. Did you feign intoxication on the way out?

Mr. Stearns: She has already answered that question. She said just the same as she did when she was out there. She has already testified to what she did when she was out there.

COURT: I think that is an answer to the question.

Q. By that you mean laughing and boisterous in the cab?

A. Yes.

Q. And what was the purpose of doing that?

A. Well, the main purpose was to keep the taxi driver from knowing our errand.

Q. For what?

A. Keeping the taxi driver from guessing our errand.

Q. Was that discussed prior to getting into the cab?

A. No, it was not.

Q. And you had never been on any of these trips before in your life, had you?

A. No, I never had.

Q. You had never been in a roadhouse before that?

(Testimony of Miss Ruth Meade)

A. No, I never had.

Q. Did you tell that to Mr. Gates?

A. I did, yes

Q. Before you started?

A. I don't remember whether it was before I started or not. I don't remember.

Q. Did you tell that to Miss Randall, that you had never been out to a roadhouse?

A. Miss Randall knew it, yes.

Q. Did you tell them you don't drink?

A. I did, yes.

Q. Did you tell them before you started?

A. They knew it, yes, sir.

Q. Yet you were required to drink at these places?

A. I was required to taste it, yes, sir.

Mr. Stearns: That is simply argumentative, if the court pleases.

Q. Were you required to drink?

A. No, we were not required to drink. We were required to taste it.

Q. Who told you you were required to taste it?

A. Nobody.

Q. Nobody told you?

A. No, sir.

Q. You did that of your own volition?

A. I did, sir.

Q. Did you know you were required to play the piano for atmosphere?

(Testimony of Miss Ruth Meade)

A. I did not, no.

Q. You claim you did that of your own volition?

A. I did.

Q. Isn't it a fact that you played the piano in all these eight roadhouses?

Objected to.

COURT: That is objectionable. I have ruled it out several times. I wish counsel would not refer to it again.

Mr. Goldstein: May I have an exception.

COURT: You may have an exception, yes.

Q. Now, did you feign intoxication at anybody's request?

A. No, I did not.

Q. And you did that of your own volition?

A. I did.

Q. How about smoking cigarettes? Did you ever smoke cigarettes before in your life?

A. I did not.

Q. They knew that, of course?

A. They did.

Q. Did you get a cigarette to smoke from Mr. Gates in the cab?

A. I did.

Q. Did you attempt to smoke it?

A. Partly.

Q. At whose request? Did he suggest you trying to smoke it?

(Testimony of Miss Ruth Meade)

A. I don't think he did, no.

Q. Did you do that also of your own volition?

A. Yes.

Q. You thought that was all part of the game to play for atmosphere?

A. Yes, sir.

Q. You were playing your part in this game?

A. I was not playing a part. I was doing the thing that I thought best.

Q. What?

A. I was doing the thing I thought best.

Q. You were doing what you thought best, without having had any previous experience?

A. I was, yes.

Q. When you were left off at Thirtieth and Belmont, I believe, on your way home—were you feigning intoxication on your way home?

A. I was not.

Q. You didn't keep it up on your way home?

A. No, we didn't; not as much as going out, no.

Q. But was any of it kept up on the way home?

A. We were talking and laughing. That is all.

(Testimony of Miss Ruth Meade)

Q. Was that part of the game or was it because it was natural?

A. It was.

Q. Was it part of the game on the way home?

A. Absolutely.

Q. Was that discussed?

A. No.

Q. When you got off at Thirtieth and Belmont—is that where you got off?

A. Yes, it is.

Q. Had anything been said about Mrs. Johnson giving a check for the fare?

A. No.

Q. There hadn't been a thing said about it.

A. I don't remember whether we discussed that or not.

Q. Did you know at that time whether Mr. Gates would have enough money to pay?

A. Well, I knew when it was discovered that he didn't have any left.

Q. I am asking you if it was discussed prior to your getting off.

A. I know, just before I got off, it was mentioned something about money, I know, he didn't have any left.

Q. Did you know Mrs. Johnson was to give a check?

A. No, I didn't, until I began to get ready

(Testimony of Miss Ruth Meade)

to get out. I always carried this purse, with my check book. She offered to give a check, and I happened to have a blank check, and I gave it to her.

Q. Then it was discussed prior to your getting out?

A. Just when I got out.

Q. As a matter of fact, didn't you testify, at the last trial of the Merrill case, that you knew nothing about giving this check?

Mr. Stearns: Just a moment. If that is an impeaching question, kindly refer to her answer.

COURT: Was that in the trial in this court?

Mr. Goldstein: Yes.

COURT: You may answer that, if you know.

Q. Did you know that?

A. Know what?

COURT: Refer to the testimony.

Q. I will ask you if you didn't testify on July 16, 1923, at this trial, the following testimony:

"Q. Do you know how it was that Mrs. Johnson paid him instead of Mr. Gates?

A. I presume because he was out of money. I got out of the cab first, and I don't know about afterwards.

Q. Wasn't it discussed afterwards

(Testimony of Miss Ruth Meade)

that that was good evidence against the taxi driver?

A. Not that night, no."

Didn't you so testify?

COURT: That is not going into the question you asked the witness.

"Q. Do you know how it was Mr. Johnson paid him instead of Mr. Gates?

A. I presume because he was out of money. I got out of the car first, and I don't know about afterwards."

Didn't you so testify?

A. I did. And I gave Mrs. Johnson a check, and she gave a check to the taxi driver.

Mr. Bynon: If your Honor please, I think it is high time counsel was required to conform to the rules. That doesn't impeach the testimony here.

COURT: It has not the effect to impeach this witness. It is only confusing, is all. I think you must have been mistaken as to the testimony as written.

Mr. Goldstein: I take an exception. I think I have a right to draw my inference from the testimony she gave at the last trial that she knew nothing about it until after.

COURT: You were asking this witness as to her conversation with Mrs. Johnson as to a check, but you switched off there as to the con-

(Testimony of Miss Ruth Meade)

versation as to whether Gates had money. It is confusing. You made it confusing.

Q. I will ask you this: I will ask you if you testified, at any time at the last trial, that you were asked to furnish a check blank?

Mr. Stearns: If your Honor please, —

COURT: That is not impeaching. She probably does not remember all that she said in that record.

Mr. Stearns: She might not have been asked that question, furthermore, your Honor.

Mr. Bynon: We are trying this case on its merits.

Mr. Goldstein: I can answer one at a time. I can't answer both of you.

Q. How many drinks did you drink there, Miss Meade?

A. I didn't drink any?

Q. How many did you taste?

A. I tasted four.

Q. Were you present when Mrs. Johnson was offered a drink the first time?

A. I know that we were all present when the first drink was served.

Q. You know that Mrs. Johnson refused the first drink?

A. I do.

Q. How?

A. I believe she did, yes.

(Testimony of Miss Ruth Meade)

Q. Did you hear her say anything as to her reason?

A. All I heard her say was that she didn't like the looks of it.

Q. And you tasted yours?

A. Yes.

Thereupon, Miss Martha Randall was called as a witness for the plaintiff, and after being sworn, testified that she lives in Portland, was Superintendent of the Women's Protective Division of the Police Bureau, knew Mrs. Ethel V. Johnson, Miss Ruth Meade, witnesses on behalf of the Government, and induced them to assist the officers of Multnomah County, Oregon, and the Federal Agents in procuring evidence of liquor law violations in road houses adjacent to Portland.

On cross-examination, Miss Randall stated that to the best of her knowledge neither Mrs. Johnson or Miss Meade drank liquor. That it was possible they might have to drink on such investigations but that the thought had not occurred to her that they might be called upon to drink liquor and to feign intoxication.

Thereupon and on redirect examination and over the objection of defendant the following question was asked and answer given:

Q. Now, Miss Randall, you may state whether or not you knew Mrs. Johnson and Miss Meade to be reliabe, responsible girls at the

(Testimony of Miss Randall)

time that you recommended them for that mission?

A. I knew them to be reliable, respectable women.

To the admission of which defendant was allowed an exception.

And thereafter the following proceedings were had:

Now, with respect to the possibility of their having to drink out there—

COURT: I don't think you need go into that.

Mr. Stearns: Well, perhaps not. It was brought out by counsel.

COURT: I know it was brought out, but it is wholly immaterial.

Mr. Stearns: That is true, your Honor. It is.

Mr. Goldstein: I take exception to your Honor's remarks about that.

COURT: Well, I want to put an end to this.

To which rule defendant was allowed an exception.

Thereupon H. L. Barker, a Federal Prohibition Agent, was called as a witness for plaintiff. Over the objection of defendant, the witness was permitted to testify that on the 15th day of May, 1923, he was handed a search warrant for defendant's place and in company with others arrived there between

(Testimony of H. L. Barker)

11 and 12 o'clock in the morning and after serving the warrant searched the entire premises, finding only empty liquor bottles (gin and manhattan), until late in the afternoon when they found some liquor in a paper sack under the steps leading from the second story of the house to the second story veranda, adjacent to the bed room of the defendant and his wife. (Thereupon witness identified ten bottles of intoxicating liquors, Government's exhibits 3 to 13 inclusive, as the liquor found under the veranda.)

To all of which testimony defendant was allowed an exception.

Thereupon P. V. Rexford, Deputy Sheriff, was called as a witness on behalf of the Government and testified that on the 15th day of May, 1923, he visited the Twelve Mile House in company with others ariving at about 11:30 A. M. and assisting in searching the premises, finding empty bottles of different kinds, many of them being empty gin and manhattan cocktail bottles, such as those introduced in evidence. Whereupon defendant moved that all testimony of the witness as to occurrences of May 15th be stricken out as being not responsive to the allegations of the information and withdrawn from the consideration of the jury as immaterial, which motion was overuled and an exception allowed thereto and exception to all of the testimony of the witness concerning the ocurrences of May 15, 1923.

(Testimony of P. V. Rexford)

The witness thereupon, subject to said objection and exception, testified that he found a paper carry-all bag under the steps leading from the second story of the house to the veranda on the second floor containing 10 bottles of intoxicating liquor which bottles were by him identified as Government Exhibits 3 to 13 inclusive. On cross-examination witness testified that he went on the search at the request of Deputy Sheriff Christoffersen and was instructed to search the place. He testified that this instruction was given on the way out in an automobile, but he received no instructions at the court house.

The witness was asked whether the Twelve Mile House was the only place he was going to search and answered that it was not; that he had been to anther place, that other places were discussed after they got to the Twelve Mile House, whereupon the following procedings were had:

Q. You said you had been to a number of places on May 15th? Where were you?

Objected to.

COURT: Objection sustained.

To which ruling the defendant excepted.

Thereupon Lloyd Linville, a Federal Prohibition Agent, was called as a witness on behalf of the Government. He testified that on May 15th, 1923, in company with others, he drove to the Twelve Mile House, sometimes known as the Plantation Inn, ar-

(Testimony of Lloyd Linville)

riving about 11:30; that they found a bottle in back of the bar with perhaps a teaspoonful of intoxicating liquor in it and that they searched all parts of the house and the outer buildings, and found a number of empty gin and cocktail bottles, and also several pint whiskey bottles back of the bar.

Thereupon T. M. Hurlburt, being called as a witness for the Government, testified that for nine years he had been Sheriff of Multnomah County, Oregon, and had been acquainted with Mr. A. B. Gates for past two or three years, and that Gates had been a deputy sheriff since about the middle of May, 1923. That while Gates was working as a general agent out of the Seattle office he had arranged with Gates to inspect the roadhouses in Multnomah County to determine whether the liquor laws were being violated.

That he saw Gates on the morning of May 11th, the morning after the investigation, and that his appearance was as usual, he gave no sign of having been drunk, and a full report of the occurrences on the night of May 10th, and that his mind seemed clear. On cross-examination the witness testified that he could not remember that Gates had ever been employed by him prior to May, 1923, except for a day or two on Prohibition enforcement work. Whereupon on cross-examination the following proceedings were had.

(Testimony of T. M. Hurlburt)

Q. Mr. Hurlburt, you had Mr. Gates working for you prior to May 10, 1923?

A. No, he wasn't working for me at that time.

Q. I ask you if you had Mr. Gates working for you on several occasions prior to May 10th, 1923?

A. Well, if he did, it is quite a long time before, because he had been connected with the Government for some time.

Q. Well, Mr. Hurlburt, do you remember whether or not he ever worked for you prior to May 10, 1923?

A. Well, not only perhaps for a day or two, is all. He may have worked a day or two.

Q. If he worked for you—you say he did work for you a day or two—what was he doing for you?

A. The only work he has ever done for me was engaged in the prohibition enforcement laws.

Q. Who paid his expenses, Mr. Hurlburt?

Mr. Stearns: Now, if your Honor please, this is really not cross-examination.

Mr. Goldstein: This is for the purpose of impeachment, purpose of credibility. I want to know what arrangement he had with Mr. Gates. Mr. Stearns asked him whether he had made arrangements with Mr. Gates on May 10th for

(Testimony of T. M. Hurlburt)

the purpose of raiding roadhouses. He also asked him how long he had known Mr. Gates. I am at this time attempting to ascertain from Mr. Hurlburt whether Mr. Gates had been in his employ prior to that time, what he had been employed for, and what arrangements he made with him on May 10th. That he went into on direct examination. I believe it is open on cross-examination to determine the extent of his employment of Mr. Gates, if he was employed.

COURT: That is the very question the court has tried to keep out of this case from the very beginning. It will not be opened up now.

Mr. Goldstein: May I ask who paid his expenses; who paid the expenses of Mr. Gates?

COURT: That is immaterial. It is not cross-examination.

Q. You state he was employed as a deputy sheriff; when did he enter your employ as a deputy sheriff?

A. When he severed his connection with the Government.

Q. When were his connections with the Government severed?

A. My impression is, along about the 23rd day of May, or 24th.

Q. Isn't it a fact that it was just four days after the raid?

A. I say, I am not positive of the time, but I think it was greater than four days—oh, after the raid?

(Testimony of T. M. Hurlburt)

Q. Yes.

A. It might have been four or five days.

Q. Why did he enter your employ, if you know? How did you happen to employ him?

A. How—I kept him employed there.

Q. Is it not a fact you employed him for the purpose of using him as a witness in these roadhouse cases?

Objected to.

COURT: The objection to that will be sustained. That is not cross-examination.

Mr. Goldstein: May I ask how long his employment is to continue?

Mr. Stearns: If your Honor please, it doesn't matter.

COURT: I will not permit you to pursue that.

Mr. Goldstein: May I have an exception? I think I have made it clear that I am endeavoring to ascertain certain information about the nature of his employment.

COURT: Well, you will not be permitted to ask that. He has a right to employ this man. He is not required to give his reasons for it, either.

Mr. Stearns: If your Honor please, if it was counsel's intention to imply by that question that Mr. Gates is held, or is employed by Mr. Hurlburt simply in order that he may act as a

(Testimony of T. M. Hurlburt)

witness here, and that he is to be dismissed immediately after this trial, I am going to withdraw my objection to that last question.

COURT: The court will not hear that. It is not testimony in this case.

Mr. Goldstein: If counsel desires to withdraw his objection, I may ask him impeaching question.

COURT: Not with the consent of the court.

Mr. Goldstein: I have a certain question to ask him as to certain facts.

COURT: Matter material to this case?

Mr. Goldstein: Your Honor has held it was not material, but he has withdrawn his objection.

COURT: The court will not permit that to be gone into.

Thereupon, defendant Fred Merrill having been sworn and having testified, upon cross-examination, the following proceedings were had:

Q. Now, you testified here that, when these people first came out to your place of business, Mr. Gates came up to the bar, and flourished a bottle of amber colored liquor?

A. That was the second time that he, when he asked me for some Scotch, that he had the amber. The first time he had a bottle with a little in it, but I didn't get a good look at that, because he was holding it in his hand. The oth-

(Testimony of Fred Merrill)

er bottle, he held it in the air.

Q. He had two bottles?

A. When he came and asked for Scotch, he had almost a full bottle of amber colored whiskey.

Q. Didn't you testify at the last trial he had one bottle?

A. That is all I saw. The other bottle, he says "Have a drink with me." I stopped him right there, before he exhibited it. I didn't see what he had in that.

Q. Now you are claiming he had two bottles.

A. The bottle that I saw last was almost full of whiskey.

Q. Well, then, that was two bottles?

A. He asked me to have a drink from another bottle, that was not full. I couldn't—

Q. Do I understand you to say that Mr. Gates had two bottles of liquor altogether?

A. Well, he must have had two bottles.

Q. Well, you know whether you saw him with a bottle of clear colored liquor and a bottle of amber colored liquor?

A. He took out a bottle, he held it so tight in his hand I couldn't get a good look at it. He was talking to the chauffeur there.

* * * * *

Q. Didn't you testify you gave him

(Testimony of Fred Merrill)

(Gates) this glass of stale ginger ale just to get rid of him?

A. After he had bought a bottle of ginger ale, and he come back and he bothered me again there, and insisted upon—wanted to know if I couldn't find one drink of Scotch, and I slid this bottle over to him to get rid of him. I didn't think he knew what he was drinking.

Q. You thought he didn't even know what he was drinking?

A. I don't think he knew what Scotch would be, anyway.

Q. He must have been pretty drunk, then, if he didn't know what he was drinking?

A. I knew he was a whiskey drinker.

Q. How about that? Wasn't he pretty drunk, then, if he didn't even know what he was drinking?

A. I didn't say, on that account. I say it because he looked like a whiskey drinker.

Q. He looked like a whiskey drinker?

A. Yes, all inflamed.

Q. Didn't you think he certainly would know whether it was whiskey or not? How about that?

A. I think he would drink anything.

Q. And think it was whiskey?

A. Anything that had alcohol in it.

Q. Did this drink have alcohol in it?

(Testimony of Fred Merrill)

A. What is that? His stuff?

Q. No, the drink you gave him there?

A. No, sir. I wouldn't keep it there.

Q. Yet you accepted fifty cents of his money for the drink?

A. I couldn't help accepting it, because I didn't find it for several minutes after he went out.

* * * * *

Q. Now, when this party (Mr. Gates, Mrs. Johnson and Miss Meade) left on that occasion, you say that they had a package containing two pint bottles of liquid?

A. They had a package.

Q. Which was wrapped up in newspaper?

A. Yes, sir.

Q. You say that Charley, the porter, gave it to you, and you handed it to the guests?

A. I handed this to them when they went to go away.

Q. Whom did you hand it to?

A. I handed it to Mr. Gates. I said: "This is something you left behind the chair." He never denied it.

Q. Did you see these people come in with that package when they came that night?

A. No, sir, I didn't see them come in.

Q. You didn't see them bring the package in?

(Testimony of Fred Merrill)

A. I didn't see them come in at all. I was in the kitchen.

Q. You say that there were two pint bottles in that package?

A. There was a package. I didn't know what there was, because I was busy. I laid it right there.

Q. Didn't you testify, on direct examination, there were two pint bottles of liquid in that?

A. That is an inference that I drew, the two shaped bottles, the package.

* * * * *

Whereupon the following proceedings were had:

Q. Mr. Merrill, have you ever been convicted of a crime?

A. No, sir.

Q. I will ask you if you ever have sold any liquor out at the Plantation Inn?

A. Sold any liquor?

Q. Yes.

A. I personally, when the country was wet, never personally sold a drop of liquor at the place.

Q. I will ask you if you didn't sell liquor out there after the country went dry?

A. What is it?

Q. I will ask you if you didn't sell liquor

(Testimony of Fred Merrill)

out there in violation of law, after the country was dry?

A. No, sir.

Q. Mr. Merrill, I will ask you if it is not a fact that, on the 6th day of September, 1910, you pleaded guilty to the crime of selling liquor, in quantities less than a gallon, out of the Twelve Mile House?

A. No, sir.

Mr. Goldstein: That is an unfair method of examination. The question previous to that was did you ever sell liquor out there after the country was dry? Immediate question after this is, if he sold any liquor in 1910. And that is at a time when your Honor, and I, and the jury know that the country was wet, and it was perfectly legitimate to sell liquor. Now, it is a method of presenting this case that I don't think is proper. I make this explanation so there may be no misunderstanding or confusion.

COURT: Is this 1910 you are inquiring about?

Mr. Bynon: Yes, your Honor. The question was, "Were you ever convicted of a crime? Did you ever sell liquor out at the Twelve Mile House in violation of law?"

Mr. Goldstein: He said when the country was dry.

Mr. Bynon: I first asked him if he ever

(Testimony of Fred Merrill)

sold liquor out there in violation of law. I propose to introduce this record of the County of Multnomah, State of Oregon, that goes to that question.

Mr. Goldstein: That is 1910.

Mr. Bynon: Yes, and it shows he violated the law.

COURT: The question here is whether or not he has been convicted of an offense. He says no. Now, you say he has.

Mr. Bynon: Yes, your Honor, and he so stated.

COURT: Have you got the record there?

Mr. Bynon: Right here, your Honor, in my hand.

COURT: Show it to him and let us see what comes of it.

Q. I will now hand you certified—

Mr. Goldstein: Show it to him without reading it, Mr. Bynon, you understand the rules.

COURT: He has a right to read from the record, Mr. Goldstein. We are taking a whole lot of time. He is calling attention to it by reading from it, but the witness has a right to see it before he answers.

Mr. Bynon: Yes, your Honor, I intend to hand it to him.

COURT: Go ahead.

Q. I now hand you certified copy of the

(Testimony of Fred Merrill)

record in the case of the State of Oregon, Plaintiff, vs. Fred T. Merrill, No. C-1534.

A. I saw this and read it at the last trial. I never was arrested in my life. I never sold a drink in my life, and my bartender and waiter sold a glass of port wine, a glass of beer at half past 1 o'clock at night, and I was sick in bed at the time, and this trial—it never came to trial.

Q. Pardon me interrupting.

COURT: Does that show that he was convicted of an offense?

Mr. Bynon: It shows he plead guilty to that violation of law your Honor.

COURT: Read the record to the jury.

Mr. Goldstein: May I have an exception?

Mr. Bynon: I will introduce this record in evidence, and ask that it be marked.

A. I never went to trial. I never was accused of it.

Mr. Goldstein: May I have an exception to that?

COURT: Yes.

Mr. Goldstein: I want the record to show objection on the ground of incompetence, irrelevance and immateriality.

COURT: It may show your objection, show the ruling of the court that your objection is not well taken, and exception allowed.

Mr. Bynon: I don't care to take up the

(Testimony of Fred Merrill)

time of the court in reading that. I may refer to it in argument, your Honor.

Marked "Government's Exhibit 14."

Q. It is not a fact, then, Mr. Merrill, that you did plead guilty.

A. I never did plead guilty.

Q. And were fined $250.00?

A. I never was tried, and never went into the court-room, if you please.

Mr. Goldstein: Now, you may make a statement of that.

Mr. Bynon: I am still examining the witness, Mr. Goldstein.

COURT: The only question here is as to whether he was convicted of an offense, and he said no. Then that record admitted here would show that he was convicted of an offense. That is the end of that. There is no use taking up time of the court.

Mr. Goldstein: The witness was making an explanation about that.

COURT: I don't think the witness can deny the record, and it is not necessary for him to go into it. I will not permit it.

Mr. Goldstein: May I have an exception, if your Honor please.

COURT: You may have your exception.

On redirect examination of defendant the following proceedings were had:

(Testimony of Fred Merrill)

Q. Now, counsel asked you if you had been convicted of a crime, and you denied it, and then introduced in evidence Government's Exhibit 14, in which George Stewart and Fred Horn are joined with you to the effect that in 1910 you were charged with the offense of selling liquor in quantities of less than one gallon without a license. Who were George Stewart and Fred Horn?

A. They was a waiter and the other man that worked there for me.

Q. Were you present in your establishment on that day in 1910?

A. I was not. I was sick with a broken collar bone.

Q. Why did you deny that?

Mr. Stearns: If your Honor please, I think this is an attempt to impeach the judicial record of the court in which this man was convicted. I think the record speaks for itself, your Honor.

A. I was never in court.

Q. Explain that. Why did you deny that?

A. Because I never was in court.

Q. What are the facts concerning that?

COURT: I don't think you can go into that case.

Q. Had you ever appeared in court?

A. No, sir.

(Testimony of Fred Merrill)

Mr. Stearns: Now, if your Honor please, here is a judicial record which states that Fred Merrill came personally into court himself, and his attorneys, and entered a plea of guilty, if it were permissible for this man to deny the record in this case, then records of courts of law would be valueless.

COURT: If that is what the record says, the court will not permit any denial of it.

Mr. Stearns: That is what the record says, your Honor.

A. I can prove it by John Logan, your Honor.

COURT: What?

A. I can prove by John Logan that he settled it out of court unbeknown to me.

COURT: You cannot go into that.

Mr. Goldstein: I would like to show, if the court please, the fact that he knew nothing about the alleged violation of the waiter or bartender of his place, and that this plea was entered, so far as he understood for and on behalf of the waiter and bartender. May I show that?

COURT. No.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: Yes, you may have an exception.

Thereupon Ivan M. Sherman, called as a witness for defendant, being sworn, testified that he had

(Testimony of Ivan M. Sherman)

been a waiter for seven or eight years and was employed by the defendant at the Plantation Inn from about the 1st of May, 1923, until the 1st of October, 1923, and was in his employ on the 10th day of May, 1923. He testified that he received instructions from defendant to allow no liquor around the place and to keep it in suppression as much as possible. He also testified that soft drinks were served but that no liquor was sold to anyone. The witness remembered the occasion of the visit of government witnesses, Gates, Johnson and Meade, to the Twelve Mile House on May 10th, and that Gates let it be known that he was a stock man from Eastern Oregon. He stated that by their actions and manner Gates and Mrs. Johnson had been drinking when they arrived; that Gates pulled out a pint flask of amber colored liquor about five minutes after he arrived and before he had seen the defendant, and said to witness, "Bring in some Scotch, I'm tired of this stockyard booze." He said that Gates with two ladies and a chauffeur partook of chicken dinner and had four rounds of ginger ale, but that no liquor was served by him to Gates and his party and that he saw none served by Merrill, and that the only liquor drunk was from Mr. Gates' bottle.

On cross-examination, the witness testified that he lived at the Twelve Mile House and was supplied his board and lodging by the defendant and

(Testimony of Ivan M. Sherman)

made his pay by tips which averaged about $35.00 a week and that he knew nothing about the liquor which the officers claimed to have found under the steps of the veranda at the time of the search on May 15th, and further testified as follows:

Q. You say you had had instructions from Mr. Merrill not to admit persons in an intoxicated condition to that house?

A. Not if they were drunk or obnoxious.

Q. Let me ask you this, Mr. Sherman: Isn't it a fact that Mr. Merrill had told you that, in admitting persons to that house in a drunken condition, you might use your own judgment?

A. To a certain extent.

Q. Well, now, to a certain extent—what do you mean by a certain extent?

A. Well, as in this case, there was no one there at the house at the time, a man come out to ask for chicken dinners, couldn't very well turn him away.

Q. Mr. Merrill had actually told you, had he. that you might, if you saw fit, admit drunken persons to that house, is that correct?

A. I wouldn't say drunken, because—

Q. Well, now, just answer the question. Is that correct, or is it not?

A. No.

Q. Well, now, I call your attention to the testimony which you gave at the former trial

(Testimony of Ivan M. Sherman)

of the case, and I am reading from the transcript of that testimony.

Mr. Goldstein: What page?

Mr. Stearns: Bottom of page 217.

"Q. He actually told you that you might if you saw fit, admit drunken persons to that house? Is that correct?

A. Yes, sir."

Q. Did you not so testify at the former trial of this case?

A. I don't remember.

Q. Well, if you did so testify, were you testifying truthfully at that time?

A. My idea of that, the extent of a man's drunkenness, a man—how he carried himself.

Q. I say, Mr. Sherman, if you did so testify at the former trial of this case, was that testimony truthfully given? You understand that question, don't you?

A. Yes, sir, it was.

Q. It was truthfully given?

A. Yes, sir.

Q. Then he did tell you that?

A. If I testified to that effect, yes.

* * * * *

Q. Was he (Fred Merrill) assisting in the kitchen that night?

A. I believe he was, for a while, yes.

Q. Now, you say that, to the best of your

(Testimony of Ivan M. Sherman)

recollection, Mr. Merrill was assisting in the kitchen that night?

A. Yes, sir.

Q. Now, I am calling your attention to cross-examination on pages 212 of the transcript of testimony taken at the last trial of the case, and I will ask you if you didn't then testify as follows:

> "Had he been working"—that is in alluding to Mr. Merrill—"had he been working in the kitchen that evening?
>
> A. No, sir.
>
> Q. Had he been cooking?
>
> A. No, sir."

Q. Did you so testify at the last trial, Mr. Sherman?

A. I don't remember.

Q. How is that?

A. I don't remember.

Q. Well, now, if you did so testify, was that true or was it not?

Mr. Goldstein: If the court please, that is argumentative.

COURT: I think he can answer that question.

Q. If you did so testify at that time, was that true, or was it not?

A. It must have been true if I testified at that time.

(Testimony of Ivan M. Sherman)

Q. Well, now, does that serve to refresh your memory? Do you recall now, your attention having been called to your former testimony, whether or not Mr. Merrill actually was working in the kitchen that night, or whether he was not.

A. I don't remember. It is seven or eight months ago. I really don't remember.

Q. Then when you testified a moment ago that he was working in the kitchen, you may have been mistaken?

A. I know that he has been out in the kitchen several occasions. I don't remember about that particular night now.

Q. How about Miss Meade? You remember Miss Meade, don't you? Did she appear to be under the influence of liquor?

A. No, sir.

Q. Was there anything unseemly or improper in the conduct of Mrs. Johnson?

A. No, sir, I wouldn't say there was.

Thereupon Russell Underwood was called as a witness for the defendant. He testified that he lived in Portland, Oregon. Had followed occupation of taxi driver and trap drummer, playing in orchestra work. That on May 10th, 1923, he met A. B. Gates, Ethel V. Johnson and Ruth Meade, witnesses for the government by being called to take them to the Twelve Mile House; that on the way

(Testimony of Russell Underwood)

to the Twelve Mile House, on the other side of Montavilla, where they drove under an arc light from an oil station, the government witness Gates put a bottle through the window of the cab, offering him a drink, calling it his stockyard stuff, and that the witness touched it to his lips to please Gates and handed it back to him, and out of the corner of his eye saw Gates tip the bottle up and heard what sounded like a gurgle from the back seat.

A. Each time after I handed it back to him, he took it out of my hand and immediately tipped it up, as far as I could see out of the corner of my eyes.

Q. You saw him do that each time out of the corner of your eyes?

A. Immediately when he took the bottle, he tipped the bottle.

Q. Could you see him place it to his lips?

A. I couldn't swear I seen him place it to his lips—but I seen him place it to his lips, I don't know how many times it was, but I heard the gurgle.

Q. You heard that gurgle each time distinctly, didn't you?

A. Yes, sir. Not each time—I wouldn't swear to each time. But I heard the gurgle of the bottle. It is an entirely different sound than the motor.

(Testimony of Russell Underwood)

The witness testified that on reaching the Twelve Mile House they went into the dance hall and from there into the soda fountain, where Gates pulled out a bottle of liquor and set it on the bar. He was told by Merrill to put it away. Thereupon the witness went out and started playing the trap drums with Mr. Merrill's permission. Later in the evening the witness ate dinner with the government witnesses, Gates, Meade and Johnson, and that during the dinner Gates made a fool out of himself; that he saw no liquor about the place except that in the possession of Gates. The witness before leaving asked employment of Mr. Merrill as a trap drummer and on the day after was engaged and worked there for about 2½ months immediately following May 10, 1923. That he never saw any liquor sold by Mr. Merrill nor any in his possession on the premises, although he acted as waiter part of the time.

Whereupon the following question was asked and proceedings had thereon:

Q. Were you a waiter there, too, or did you act as a waiter?

A. I filled in once in a while when the other waiter was in town or something, and worked as extra.

Q. As such waiter, did you receive any instructions from Mr. Merrill concerning liquor or the use of liquor by the guests?

(Testimony of Russell Underwood)

Mr. Stearns: Just a moment, if your Honor please. If that question is confined to the time prior to Mr. Merrill's arrest, I have no objection; but if it is since then it would be a self-serving declaration, and would not be admissible, I think.

MR. GOLDSTEIN: This is prior to May 15th, which is one of the alleged acts of nuisance. He was working prior to that time. I imagine your Honor would rule I could prove anything immediately prior, immediately subsequent so long as it is close enough to the alleged occurrence of the nuisance to show how the place was being conducted.

COURT: Confine it to the 15th.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: Yes.

Mr. GOLDSTEIN: I understand the court has ruled that I cannot show by this witness the method of conducting the place of business immediately after May 15th?

COURT: No.

Mr. Goldstein: I will take an exception to your Honor's ruling.

Q. Between May 10th and May 12th you were in his employ?

A. Yes, sir.

Q. Do you know what the instructions of

(Testimony of Russell Underwood)

Mr. Merrill were to the help with respect to liquor at that time?

Mr. Stearns: I think that question is objectionable, too, unless he can testify that he received instructions from Mr. Merrill between the time that he went to work for him and the 15th.

COURT: What instructions did he give you about that?

A. At that particular time I hadn't been there long enough; I had been playing trap drums there up to that time. I hadn't got any instructions about it.

Q. When did you first learn?

A. Well, I can't say exactly when. It was not very long after I was there, the first time I ever filled in as a waiter, extra.

Q. I will ask you when was it the first time you filled in as a waiter. Let's get that time.

A. Well, I can't state exactly that, because I don't remember. It was not—very soon after I started to work there, possibly two or three weeks after.

To which ruling the defendant was allowed an exception.

Thereupon C. E. Carroll, a witness on behalf of defendant, was called to the stand, sworn, and the following proceedings were had:

(Testimony of C. E. Carroll)

Q. What office, if any, do you hold, Mr. Carroll?

A. Sheriff of Jackson County.

Q. How long have you been Sheriff of Jackson County?

A. Five years the first of January.

Q. How long?

A. Five years the first of last January.

Q. Do you know a man by the name of Mr. Gates?

A. I do.

Q. When did you become acquainted with him, and for how long did you know him, and where was he located?

A. I think it was two years ago, or three years ago last summer, or in the fall.

Q. Where was he located?

A. In Jackson County.

COURT: Where?

A. At Medford, Jackson County.

Q. What was he doing there, do you know?

A. Do you want to know just what I call it?

Q. No, no. What was he doing there?

A. Well, that was the question I was going to answer for you.

Mr. Stearns: Now, if your Honor please, at this time I should like to know the object of counsel in calling this witness. If it is for the

(Testimony of C. E. Carroll)

purpose of attacking the character of Mr. Gates, then of course, he would be limited to the well known rule of common reputation in the neighborhood in which Mr. Gates resides. If it is for the purpose of impeaching some statement that Mr. Gates may have made on the stand, I call your Honor's attention to the fact that no foundation has been laid for any such attack by this witness.

Mr. Goldstein: This is preliminary to the question I am about to ask him.

Mr. Stearns: Furthermore, I call your Honor's attention specifically to the fact that Mr. Merrill, and not Mr. Gates, is the defendant in this case. Mr. Gates is not on trial here.

COURT: What is it you want to ask?

Mr. Goldstein: I am going to ask him if he knows the reputation of this man Gates for veracity in Medford, where he had been residing and working as a state Prohibition Agent, working under the county, Jackson County.

COURT: Do you know his reputation in Jackson County?

A. I do.

COURT: For truth and veracity?

A. I do.

COURT: Get to the question, then.

Mr. Goldstein: I thought I could ask a preliminary question or two as to what Gates was doing at that time, if he knows.

(Testimony of C. E. Carroll)

COURT: I don't think you can ask that question.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: You may have your exception.

Q. You state you know Mr. Gates' reputation for truth and veracity in Jackson County, Sheriff Carroll. What is it good or bad?

Mr. Stearns: Just a moment.

COURT: To what date do you refer?

Q. When was this two years? How long ago?

A. I would have to look at the records down there to find just the date, but I am under the impression it was two years ago last fall, and in August.

Mr. Stearns: Moreover, I should like to say to your Honor that this seems to be a departure from the rule, relative to the question in hand here. If I understand the law on reputation, the only question which would be permissible would be whether or not he knows the reputation of Mr. Gates in the neighborhood in which he resides. Now, Mr. Gates was only temporarily in that county. Mr. Gates' home is here in Portland, and he is best known here in Portland, and this, I think, your Honor, is the proper place from which to draw witnesses to

(Testimony of C. E. Carroll)

impeach Mr. Gates' character, if the defense is able to do so, not to go afield to some distant county of the state, where Mr. Gates happened to be temporarily sent on some mission.

COURT: How long was Mr. Gates down there?

A. He was there about three months, I should judge, making an off-hand guess.

Q. COURT: Three months?

A. Yes.

COURT: Long enough to form a reputation.

A. He certainly did form one.

COURT: That is two years ago?

A. I think it was two years ago about last August he came.

COURT: He was there temporarily?

A. Yes.

COURT: What is it you want to ask?

Q. You may state what was his reputation, whether it was good or bad.

A. It was bad.

COURT: Just a moment. I am in doubt whether that should be proceeded with. He was only there temporarily, for a short time.

Mr. Goldstein: I was asking Mr. Gates, if your Honor will recall, what he had been doing for the last four or five years, and most of his time he spent, not in Portland, but in go-

(Testimony of C. E. Carroll)

ing from place to place. He might have maintained a residence here, but his operations and place of business were in Medford, he testified to, and Salem, and Astoria, and Heppner; and if he stayed in Medford three months, sufficiently long to permit of reputation being established as to his truth and veracity.

COURT: I think the rule is that it must be confined to the community in which he resides, and I shall so hold in this case.

Mr. Goldstein: I will take an exception to your Honor's ruling.

COURT: You may have your exception. That may be stricken out.

Mr. Stearns: I ask that it be stricken out and the jury instructed to disregard it.

COURT: Yes, that may be stricken out, and the jury are instructed to disregard it.

Thereupon E. W. Aylsworth was called as a witness on behalf of the defendant. Testified that he was married and for three years had lived in Gresham across the road from the Twelve Mile House. Whereupon the following proceedings were had:

Q. I will ask you if you know the general reputation of that place, in that immediate community, among the neighbors, as to a place where liquor is being sold or kept?

COURT: Answer that yes or no.

(Testimony of E. W. Aylsworth)

A. Yes, I think so.

Q. Now, what would you say as to what its reputation is as a place—

Mr. Stearns: Just a moment.

COURT: Is it good or bad?

A. Well, it depends a little on what reputation is. If what you hear of a place is reputation, why, you hear lots of things. But not knowing particularly I don't know that—I would'nt say that I could say.

COURT: Can you say whether it is good or bad?

A. From what I hear?

COURT: Yes, from what you hear among these people you associate with.

A. I have heard that it was bad; and then I have heard that neighbors say right adjoining that they think most of this trouble he is into is mostly bunk; that they don't believe it; they don't believe he had it. I have heard that.

Q. But from what you know, what do you say would be the reputation?

COURT: Not what he knows.

Q. From the reputation you gathered among the neighbors those who knew—have means of knowing?

A. Well, those who live—

Mr. Stearns: The question is, as I understand it, first do you know the reputation of

(Testimony of E. W. Aylsworth)

that place in the neighborhood as to being a place where intoxicating liquor is kept and sold. that is, the common reputation.

COURT: Yes, that is the question. And that should be answered Yes or No; and then the further question should be put, is it good or bad. And that should be answered Yes or No.

Mr. Stearns: And that goes to the common reputation.

Mr. Goldstein: I think the witness ought to understand that it is the reputation among the neighbors in that community.

COURT: Well, those whom he associated with.

Mr. Goldstein: Yes.

Q. What would you say as to that reputation? Is that good or bad?

COURT: Is that good or bad?

A. Those who are—

COURT: Just answer the question now.

A. Could I answer the question?

COURT: Would you say that is good or bad?

A. I have heard lots of bad things about the place.

COURT: What?

A. I have heard it bad.

Q. I will ask you what you have heard as to the reputation of that place, as to whether it is good or bad?

(Testimony of E. W. Aylsworth)

COURT: That has already been explained to him.

Mr. Goldstein: I believe I am entitled to have the witness explain that answer, if it is susceptible of explanation.

COURT: I think it should stop where the witness puts it by his answer Yes or No.

Q. Well, can you answer what you have stated?

Mr. Stearns: I think that has been ruled on.

COURT: Yes, I think the witness has answered the question.

Q. Mr. Aylsworth, probably you misunderstand the question. You have heard the reputation of the place discussed by the neighbors, have you?

A. Yes.

Q. And you have also heard it discussed by people, outsiders, who are not neighbors?

A. Yes.

Q. Now, by the neighbors who are in position to know, have you heard it discussed among them?

A. Yes.

Mr. Stearns: Just a minute.

COURT: You have to take the whole thing together, and ask him whether it is good or bad.

Mr. Stearns: He has already done that your Honor; and, if the Court please, certainly

(Testimony of E. W. Aylsworth)

he would be bound by the answer of his own witness.

Mr. Goldstein: Oh, I don't know as that is such a rule. I have a right to have the witness explain the answer.

COURT: Well, you know that rule as well as anybody in the courtroom.

Mr. Goldstein: About what rule?

COURT: About impeachment on reputation.

Mr. Goldstein: I understand the rule perfectly.

COURT: You know the practice as well as any man in the courtroom.

Mr. Goldstein: I understand, but where a witness does not understand, I think he has a right to explain.

Q. Now, Mr. Aylsworth—

COURT: I think you have to stop now. I will not permit any further inquiry.

Mr. Goldsmith: May I have an exception?

COURT: Yes, you may have your exception.

Mr. Goldstein: May I state what I would expect the witness to state—not in the hearing of the jury? I want the record to show.

COURT: Whatever you state, you may state outside. This jury is an intelligent jury. And state it short.

(Testimony of E. W. Aylsworth)

Mr. Goldstein: This witness will testify that, among the neighbors who know, who are in a position to know, the reputation of that place is very good. But the reputation among those who are not in a position to know who base their information upon newspaper account and prejudiced reports, it is not good; and that is what he would explain if permitted to answer; and that he has been himself in the place many times.

COURT: You know that is not proper.

Mr. Goldstein: As preliminary?

COURT: What he ascertains by being in the place. That is not character testimony.

Mr. Goldstein: As preliminary to that question, I was going to ask him—

COURT: As preliminary or in any other sense.

Mr. Goldstein: May I have an exception to your Honor's ruling?

COURT: You may have an exception.

Mr. Goldstein: I think that is all.

Mr. Stearns: No cross-examination.

COURT: You may stand aside.

Thereupon J. J. Braund was called as a witness on behalf of defendant and testified that since April 3, 1923, he had lived and operated a garage and filling station three-quarters of a mile from Plantation Inn; that he knew the reputation of defend-

(Testimony of J. J. Braund)

ant's place in that community around May, 1923, as to being a place where liquor was kept and sold and testified that it was pretty good at that time. Whereupon cross-examination, the following proceedings were had:

Q. Yes. Now, may I ask with whom you discussed the reputation of that place on or before May 10, 1923?

A. Well, I can tell you Mr. Watson, who has lived there for—I think he told me thirty-five years.

Q. Where does Mr. Watson now reside?

A. He lives right there, at Eastwood, they call it.

Q. You say that you had a conversation with him as to the reputation of the Twelve Mile House?

A. Yes, sir.

Q. How did that conversation happen to come up, if you remember.

A. Well, a number of times, I have often asked about the Twelve Mile House, I have heard about it so much, I have asked about it. They have told me different stories. Some told me one thing, one another.

Q. Well, now, what had you heard of it prior to that time?

A. Well, I had heard that they had sold booze there, and I had heard that they hadn't

(Testimony of J. J. Braund)

sold booze there, and I had taken it up, asked Mr. Watson about it. There were three of us there at the time we had this talk. Mr. Watson said it one time was a very bad place, but since Merrill had taken hold of it this time it was getting pretty good.

Q. Is Mr. Watson still living?

A. Yes, sir.

Q. Still living out there?

A. Yes, sir.

Q. Do you see him in the court room here?

A. No.

Q. Now, with whom else had you discussed the reputation of Mr. Merrill's place prior to the 3rd day of May, 1923?

COURT: The 10th day.

Mr. Goldstein: Prior to when?

Q. I should say the 10th day of May, 1923?

A. Well, I don't know as we discussed so much before that, but after he was arrested, why, there was a lot of discussion around there.

Q. We are not interested in the discussion that took place afterwards, but we are interested in the reputation at the time and prior to the time that the raid was made.

Mr. Goldstein. I object to the limitation of the question, on this ground, that he might know the reputation on or about May 10th, and it might be by reason of some conversations he

(Testimony of J. J. Braund)

might have had with the neighbors subsequent to May 10th.

COURT: I don't think that could be taken into account.

Mr. Goldstein: They might at that time, by reason of what appeared in the newspapers, discuss among themselves as to their understanding as of May 10th, but the conversation might have taken place some time subsequent thereto.

COURT: I don't think you can prove reputation that way. It must be confined to on and prior to May 10th.

Mr. Goldstein: That is true as to the reputation, but I am talking about the conversation. Does your Honor rule that the conversation must be?

COURT: Reputation is formed by what the neighbors, people in the community, say about it. Of course, in this case the reputation must have reference to the time when this offense is charged to have been committed. Now, then, this witness must have learned the reputation prior to or at that time, and what people said about it afterwards cannot control his testimony as to the reputation.

Mr. Goldstein: Isn't reputation also ascertained by the fact that nothing derogatory of a place or person is said?

COURT: You cannot create reputation after the transaction.

(Testimony of J. J. Braund)

Mr. Goldstein: Isn't a man's reputation established by the fact that nothing has been said against him?

COURT: I think if there were other men talked about it afterwards, they should be the men that would testify here; not what they said to this man.

Mr. Goldstein: May I have an exception to your Honor's limitation.

COURT: Yes.

* * * * *

Q. And you say they said that reputation was good?

A. Said it was good at that time, said it was nothing like it used to be in the olden days; one time it used to be pretty fast, but it was pretty good now.

Q. Pretty good?

A. Yes.

Q. They qualified it by the use of the word "pretty"?

A. Yes.

Q. You are sure of that?

A. Well, words to that effect. I wouldn't say they said "pretty".

Q. Might not have said "tolerably fair"?

A. No, they never said nothing like that. It would be about the same thing.

(Testimony of J. J. Braund)

Q. Isn't that the impression you gained from what they said?

A. Yes.

Thereafter, and upon the completion of the testimony offered by the parties and prior to argument defendant requested the court to instruct the jury as follows:

"In connection with the charge against the defendant for maintaining a nuisance, where intoxicating liquor was kept or sold, I instruct you that the word "maintain" as used in the prohibition act means "continuance" and implies a certain degree of "permanence". Congress by the use of the words "Kept and sold" in violation of law, means either habitually or continually or recurrently so "kept" and "sold". In other words, a single act or a single sale is insufficient. I therefore instruct you that to constitute a nuisance, the prosecution must satisfy you by evidence beyond a reasonable doubt of the continuance and recurrence of acts or sales in violation of the law. If the evidence falls short of the required proof, your verdict should be for the defendant."

* * * * *

"The evidence in this case tends to show that Mr. Gates and his associates went upon the premises in question with their own liquor and it is contended by the defendant that they did so with the specific purpose of using their own

liquor as a means of entrapping the defendant in committing a violation of the law. I instruct you that the first duty of officers of the law is to prevent and not to punish crime and it is not their duty to incite or create crime for the sole purpose of prosecuting and punishing it. A conviction will not be sustained where the officers originate the intent and apparently join in the criminal act, first suggested by the officers merely to entrap the defendant."

* * * * *

"Therefore, if you believe that the defendant was induced by the importunity of the officers to violate the law, that is, if he did violate it, and if through their inducement, he sold the liquor or permitted them to drink the liquor on his premises, then you should return a verdict of not guilty, as it against the policy of the United States Courts to sanction a conviction in any case where the offense was committed through the instigation of public agents."

And thereafter and at the conclusion of argument of counsel the court instructed the jury as follows:

"Gentlemen of the Jury:

We are approaching the end of this trial, and it becomes the duty of the court to instruct you touching the law of the case, for your edification and to assist you in determining what your verdict shall be upon the testimony and the evidence adduced at the trial.

The case about to be submitted to you is against Fred T. Merrill, and he is charged by an information filed in the court with a violation of the National Prohibition Act. The act, as far as material at this time, makes it an offense for any person to have in his possession intoxicating liquor, or to sell such liquor, and it declares that any rooming house, building, booth or place where intoxicating liquor is manufactured, sold, kept, or bartered, in violation of this statute, is hereby declared a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor, and upon conviction shall be punished as by the statute provided.

The information charges that, on the 10th day of May, 1923, the defendant violated this statute (1) by having in his possession intoxicating liquor, (2) by making a sale of such liquor, and (3) by maintaining a common nuisance, that is, a place where intoxicating liquors are kept, bartered, or sold. The statute defines intoxicating liquor as any liquor fit for beverage purposes which contains more than one-half of one per cent alcohol by volume. And the evidence shows, and about that there is no conflict, that the liquor that the Government claims was purchased from the defendant Merrill is intoxicating liquor within the meaning of the statute.

Now, the defendant has entered a plea of Not Guilty and that plea imposes upon the Government the duty of proving his guilt, to your satisfaction, beyond a reasonable doubt, before you will be justified in finding him guilty. He is clothed by law with the presumption of innocence, and this presumption continues with him, and he is entitled to the benefit of it until it is overcome by testimony.

It is said that the date which is fixed in the information as the time when the offense was committed is not material. It is not material in this way: that it is not necessary to prove the offense charged on the exact date charged. It is sufficient if it is proven approximately to that date. But the offense here charged is an offense which was committed at the time that Gates and the two women went from here to Merrill's place, and that is the offense charged, and it must be proved. You will remember the circumstances: that the parties went out on the 10th, and remained there until the 11th, in the morning, and then returned home. Now, that is the charge, and the one that must be proven in this case.

The information itself which charges the defendant with having committed these crimes is not evidence of the fact of guilt. It is merely an *accusatory* instrument, setting up the charges, but the case itself, or the guilt of the defendant,

must be proven by the testimony which has been offered here, and by none other. You are not, also, to be influenced by what you have read or heard about the case, either during the trial or before the trial. You will confine your consideration and deliberations to the testimony which has been adduced here, both on the part of the Government and on the part of the defendant, and your judgment is to be based upon that testimony, and nothing else, and upon the law that the court gives you.

Now, the question involved in this case is a question of fact; Do you believe from the testimony, beyond a reasonable doubt, that, at the time or about the time stated in the information, the defendant Merrill had possession of intoxicating liquor? If so, and you do so believe, then you should find him guilty as charged in the first count of the information.

The second count charges that, on that same date, he made a sale of intoxicating liquor, and if you believe, beyond a reasonable doubt, that he did so, then you should convict him of that offense.

It is also charged that at the same time he maintained a common nuisance, that is, a place where intoxicating liquors were kept, bartered and sold. Now, a single sale, without more, would not constitute a nuisance. But if, however, a sale is made in a place fitted up for the transaction of business, and in the ordinary

course of business, as if one should approach a bar in the business house, ask for and obtain intoxicating liquor from the manager or person in attendance, although there was but one purchase, it would be sufficient to justify the jury in finding that it was a common nuisance, or a place where intoxicating liquors were kept, bartered and sold.

There has been some evidence offered in the trial of this case tending to show that the establishment conducted by the defendant and known as the Twelve Mile Roadhouse, bore a common reputation as being a place where intoxicating liquor was kept and sold, and I instruct you that this is competent evidence and should be considered by you in determining whether or not the defendant is in fact guilty of maintaining a nuisance at the time and place and in the manner charged in the information. A subsequent raid, as you will remember by the testimony, was made upon the roadhouse of date May 15th. This you may take into consideration, and what happened and what was found there, on the question whether the defendant was maintaining a nuisance as charged, and that testimony must be considered in that light, and that is the purpose for which the court admitted it here.

Now, as I have said, the proof must satisfy you of the defendant's guilt beyond a reason-

able doubt. A reasonable doubt simply means such a doubt as would cause a reasonable prudent man to hesitate to act in his own important affairs. It does not mean a mere possible doubt. It does not mean such a doubt as a jury might conjure up in its own mind based upon sympathy for the defendant, or upon a feeling that the law ought not to be enforced, or upon the methods adopted in securing the evidence. But it is a doubt based either upon the testimony or the want of testimony. And if, after you have considered all the evidence, you entertain such a doubt, you should give the defendant the benefit of it and an acquittal. If, on the other hand, you do not, then it is your duty, under your oaths, to find him guilty.

This is a prosecution under the National Prohibition Act, and neither this court nor the jury are concerned with the wisdom or propriety of that act. We are not sitting here as legislators, nor are we sitting here as executive officers charged with the duty of enforcing the law. We are simply called upon to determine whether, under the evidence in this case, the defendant has violated the law; and if he has, he should be convicted. If he has not, or if you have a reasonable doubt on the subject, you should acquit him, and that regardless of whether you approve or disapprove of the law. You may believe that the law was unwise; you may

think its provisions are unwise; but that is not a matter with which you have any concern. On the other hand, you may feel, some of you, that this is a wise law and ought to be enforced, and are disposed to feel that one charged with its violation should be convicted. But the fact that you may approve the law or not should not influence your verdict one way or the other in this case. It is simply a question for you to say, under this testimony, whether the defendant is guilty as charged.

You are the exclusive judges of the credibility of the witnesses. Every witness is presumed, under the law, to speak the truth. The law presumes that one who comes into court and takes an oath to tell the truth, the whole truth, and nothing but the truth, does so. But this may be overcome by the manner in which a witness testifies, by his or her appearance upon the witness stand, or by contradictory testimony. You have seen these witnesses. You have heard them testify. You have noticed their appearance on the witness stand. And now it is for you, and you alone, to determine and say what weight is to be given to the testimony of each and every one of them. It is your duty, if you can, to reconcile the testimony on the theory that each and every witness has told the truth as he understands it; but, if you are unable to do that, then you should take the testi-

mony of the witnesses that seem to you most reasonable and probable under the circumstances.

Now, there is a sharp conflict in the testimony as to what occurred on the journey from Portland out to the Twelve Mile House. Mr. Gates and his companions, Mrs. Johnson and Miss Meade, testify that no liquor was in the possession of the party, and no liquor was drunk by any one on that journey. The taxicab driver, however, testified that Mr. Gates had a bottle of liquor, that he drank from it three or four times on the way out, and that he offered it to him, the taxicab driver. Now, if these witnesses have reference to the same journey and the same transaction, there is such a sharp conflict in the testimony that, from any standpoint, it is impossible to reconcile it. One or the other of the parties if they refer to the same transaction, was telling that which was not true. It was not a matter about which people could be mistaken. Either Mr. Gates did have liquor and drank it on the way out there, or he did not. Therefore, there is such a very sharp conflict in the testimony on that question that, if they have reference to the same journey there is not, in my judgment, any way to reconcile their testimony. You will therefore have to find, as far as that matter is material, that one or the other of them told that which they knew to be untrue.

However, this is not the crux of this case, and that is not the controlling question in this case. Whatever Mr. Gates may have done on the way out, or however much he may have drunk on the way out, if he did drink, would only go to his credibility as a witness, and would be no defense or excuse for a violation of the law by selling him liquor after he got out to the roadhouse, because it is just as much a crime to sell to a drunken man as it is to sell to a sober man. So that the real question in this case is what occurred after these parties arrived at the roadhouse; and you have a right, and it is your duty, of course, to consider their condition at that time, the circumstances surrounding the transaction, as going to their credibility; but if you believe, from the evidence, beyond a reasonable doubt, that, after they arrived at the roadhouse Mr. Merrill sold to them, or any one of their party, intoxicating liquor as claimed by the Government—if you believe that beyond a reasonable doubt, then it would be your duty to find him guilty, notwithstanding you may think that Mr. Gates was drunk, or had been drinking, or that he had told what was untrue of some other transaction. Of course, if the testimony of a witness be deliberately false in one particular, it is to be distrusted in all.

Now, it also appears that the witnesses for the Government in this case were either prohi-

bition enforcement officers, or members of the sheriff's force, or the two ladies who accompanied Mr. Gates on his journey. Now, they are not to be discredited as witnesses because of their occupation. Their credibility is to be judged the same as that of any other witness, and, of course, their occupation is to be taken into consideration by the jury in weighing their testimony, and the purpose for which they made the journey is an important matter to be considered. But if you believe they were telling the truth, then you have no right to discredit their testimony because they were Government officials or in its employ. In judging the testimony of the witnesses, you should, of course, consider their interest and their relationship to the parties, their relationship to the prosecution or the defense, but the same rule should apply in considering the testimony of the witnesses who have testified on behalf of the defendant in this case

It is also in evidence that, after these parties arrived at the roadhouse, they feigned, as one of the witnesses said, intoxication; if they were not really intoxicated, they at least feigned intoxication. Now if they did that, and the sale was made as claimed by the Government, it would be no defense in this case. One cannot be induced or persuaded by a Government officer to commit a crime, and then be

prosecuted, but a Government officer may lawfully afford an opportunity for the commission of an offense, and the testimony of the Government in this case tends to show that that is all these Government witnesses did. They went out to this roadhouse; they, as one of them said, attempted to create an atmosphere that would make it possible for them to buy liquor at that place. You may not approve of that method. It may not be the best method. I don't know. But it would be no excuse or defense for the violation of the law. It may go to the credibility of the witnesses, but if you believe that the sale was made as claimed, then it would be a violation of the statute.

Now, the defendant has testified in his own behalf. He has denied the charges, denied on his plea of not guilty and on the stand the charges made against him. You should apply to his testimony the same test you do to that of any other witness, and give it such weight and credit as you think it is entitled to, keeping in mind, as you should, however, in weighing his testimony, the interest he naturally has in the result of the prosecution.

In the trial of a case of this character, the functions of the court and jury are separate and distinct. It is the duty of the court to pass upon questions of law and the competency of the testimony; but it is the duty of the jury, and

the sole duty of the jury, to pass upon all disputed questions of fact; and the court has no desire, or no right, to invade your province and undertake to determine any question of fact, and therefore, if at any time during the progress of this trial, the court has intimated in any shape or form its views upon any question of fact in the case, or the credibility of any witness or the weight of any testimony, you are to disregard it. You are,, under your oaths, required to disregard it, unless it conforms with your own views. The responsibility for this verdict in this case must rest upon the jury, and not upon anyone else.

Now, the punishment that may follow a verdict of guilty is not a matter to be considered by the jury. Your province and your duty is to determine whether or not the defendant is guilty of the crime charged against him, and if you believe beyond a reasonable doubt that, at the time or about the time stated in the information, as claimed by the Government, the defendant sold to Mr. Gates or members of his party intoxicating liquor, as they claim, and under the circumstances as stated by the Government witnesses, then he is guilty of all three crimes charged in this information, and you should so find by your verdict. If, on the other hand, you do not so believe, or if you have a reasonable doubt upon the subject, then it is your duty to give him the benefit of it and to acquit.

Thereupon the following exceptions were taken thereto:

Are there any exceptions?

Mr. Goldstein: If the court please, defendant desires to have an exception only to the failure of the court to give the requested instructions, or in giving the instructions requested as may have been modified as given by the court.

Now, I believe your Honor has made clear that the only case that the jury have a right to consider is that incident connected with May 10th, which is what we know now as the incident concerning Gates and his party, and that the other evidence is merely collateral and incidental, depending upon their belief as to whether or not the facts as stated by Mr. Gates have been established by the evidence. I think it should be made clear to the jury that, if they do not believe the testimony as given by Mr. Gates and his party, they have no right to take into consideration any of the evidence concerning the May 15th transaction, or any of the evidence concerning the waiter.

COURT: I think the instructions are clear enough about that.

Mr. Goldstein: And also in the court not limiting the testimony of the waiter. I believe he overlooked instructing the jury about that. They have no right to consider that except as it

might tend to corroborate, assuming that they believe the offense took place on May 10th.

COURT: What is it you refer to?

Mr. Goldstein: Plaintiff brought in a waiter—Nickell, I believe—as to something that took place in April, prior to this, and which is not the basis of this allegation or charge. May I have the record show they would not have a right to consider that unless they believe the charges alleged in the information have been established as to May 10th.

COURT: I think I have made that clear.

Mr. Goldstein: May I have an exception?

COURT: Yes.

Mr. Goldstein: May I have an exception to this: What is meant by possession of liquor as defined by the act, it must be, as I take it, possession with intention of selling; not mere possession.

COURT: I think you are wrong about that.

Mr. Goldstein: May I have an exception on that? I appreciate your Honor and I may differ about that.

COURT: Yes.

Mr. Goldstein: Also with respect to your Honor's instructions as to what constitutes a nuisance, and the right to adduce evidence as to the general reputation, and the instruction as to entrapment. May I have an exception to that?

COURT: You may have your exception.

It is hereby stipulated and certified that the foregoing instructions set out herein as having been given by the court to the jury are all of the instructions given by the court to the jury.

Thereafter, the jury returned into court a verdict of guilty as charged in the information.

And thereafter, and within the time allowed so to do, defendant moved for a new trial of said cause which motion was thereafter argued and denied and to which ruling defendant was allowed an exception.

Thereupon, defendant moved the court to arrest judgment upon said verdict which motion was thereafter argued and by the court denied, to which defendant was allowed an exception.

And now because all the foregoing matters and things are not of record in this case, I Charles E. Wolverton, being the Judge who tried the above entitled cause, do hereby certify that the foregoing Bill of Exceptions correctly states all the proceedings had before me on trial of said cause so far as they pertain to these particular exceptions and correctly states all the rulings of the court upon the questions presented and that the exceptions taken by the defendant were duly taken and allowed; that the foregoing Bill of Exceptions was prepared and submitted within the time allowed by order of the court and is now signed and settled as and for a Bill of Exceptions in said cause and made a part of the record therein.

In witness whereof I have hereunto set my hand this 10th day of Janury, 1925.

CHAS. E. WOLVERTON,
United States District Judge.

Endorsed: Filed Jan. 10, 1924.

G. H. Marsh, Clerk.

And afterwards and on the —— day of ———, 1925, there was duly filed in said court a

(Title)

STIPULATION

in words and figures as follows, to-wit:

The attorneys for the plaintiff in error herein having prepared and compared the original record with the within printed transcript, now, therefore, it is hereby stipulated and agreed by and between the parties to the within proceedings for Writ of Error, by and through their respective attorneys, that the within printed record tendered to the clerk of the United States District Court for the District of Oregon for his certificate, is a true transcript of the record in the within cause and that the clerk of said court shall certify the said printed transcript without comparison thereof with the original record.

____
Of Attorneys for Plaintiff in Error.

____
Of Attorneys for Defendant in Error.

Dated:

Clerk's Certificate

United States of America, District of Oregon—ss.

The attorneys for the respective parties to the within proceedings having stipulated that the within printed transcript of record, as prepared, compared and tendered to me for certification by the attorneys for the Plaintiff in Error is a true transcript of the record in this cause and that I shall certify same without comparison.

Now, therefore, in accordance with the within Stipulation, I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify without comparison with the original thereof, that the foregoing transcript of record upon writ of error in the case in which Fred Merrill is defendant and plaintiff in error and the United States of America is plaintiff and defendant in error, is a full true and correct transcript of the record and proceedings had in said court in said cause as the same appear of record in my file and in my custody, the same having been compared by attorneys for plaintiff in error.

And I further certify that the fee for certifying to the within transcript, to-wit the sum of $———, has been paid by the said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said district, this —— day of ————, 1924.

————————————

Clerk of the District Court of the United States for the District of Oregon.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have compared the foregoing printed transcript of record on writ of error to the said court in a cause in which the United States of America is plaintiff and defendant in error and Fred Merrill is defendant and plaintiff in error. And that the said printed transcript as corrected by me is a full, true and correct transcript of record and proceedings had in said court in said cause as the same appear of record and on file in my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is $42.50 and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 20th day of February, 1925.

(Seal) G. H. MARSH,
Clerk.

No. 4503

United States Circuit Court of Appeals

For the Ninth Circuit 9

FRED MERRILL,
Plaintiff in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error

Supplement to Transcript of Record

Upon Writ of Error to the District Court of the United States for the District of Oregon

FILED

SUPPLEMENT TO BILL OF EXCEPTIONS

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
Plaintiff

FRED T. MERRILL,
Defendant

It appearing, that heretofore and in the course of the revision of the Bill of Exceptions, and in the compilation of the Amended Bill of Exceptions, thereafter and on the 10th day of January, 1925, settled and allowed, as and for, a Bill of Exceptions in the above entitled cause, there was, through inadvertence and excusable neglect, a certain portion of the testimony of the witness Ruth Meade omitted therefrom, and that said portion of the testimony of the witness was and is omitted from the Bill of Exceptions as printed in the transcript of record herein, and that the same should have been entered on page 24 of the Bill of Exceptions, at page 102 of the Transcript of Record herein, and immediately preceding the following: "COURT: 'You are asking that question?' "

It is hereby stipulated and agreed, by and between the respective parties acting through and by their undersigned attorneys, that the testimony of the witness Ruth Meade, appended hereto, may be by reference added to and incorporated into the

Bill of Exceptions, and that the same may be considered upon appeal herein as though the same were incorporated in the Bill of Exceptions in its proper position.

J. O. STEARNS, JR.,
Of Attorneys for Plaintiff in Error.

BARNETT H. GOLDSTEIN,
Attorney for Defendant in Error.

Q. Well, then, for the purpose of refreshing your recollection, I will ask you if you didn't state—for the purpose of impeachment, I will ask the following question, if you didn't testify on May 29th, just nineteen days after this alleged occurrence, the following, in the presence of Cloyd D. Rauch, a court reporter in Judge Hawkins' court room, the following testimony:

Mr. Bynon: This is another case, Your Honor—has reference to another case. I object to the question. I object to his reading from any transcript in any other case.

Mr. Goldstein: This is an impeaching question as to what took place that afternoon of May 10th.

Court: Go ahead. See what it is.

The following questions were asked and the following answers given:

Q. Well, I ask you again what was your definite duty in this plan of operation?

A. To help get evidence.

Q. Who told you to do that?

A. That is what I was sent for.

Q. Who told you to do that?

A. Sheriff Hurlburt.

Q. Did he himself tell you?

A. Yes.

Q. Did he give you instructions?

A. He gave us instructions, and later through Mr. Gates.

Q. He gave you instructions?

A. Yes, sir.

Q. And when did he give you those instructions?

A. He gave me those instructions in the afternoon.

Q. Of May 10th?

A. Yes, sir.

Q. Where?

A. At his office.

Q. Who else were present?

A. Mr. Gates and Mrs. Johnson.

Q. Three of you employes?

A. Yes, sir.

Q. Now, what were the instructions that the sheriff gave you?

A. We were to get evidence from these houses.

Q. How were you to get the evidence?

A. In a party of three.

Q. How were you to get the evidence?

A. To buy it.

Q. How?

A. To buy it.

Q. Well, what were you supposed to do?

A. We were supposed to go out there in a party and buy this evidence.

Q. Were you supposed to go out with whisky?

A. If we had to.

Q. Were you supposed to go out with whisky?

A. If we had to, yes.

Q. Were you supposed to go out with whisky?

A. When we had to."

Mr. Bynon: Object to.

Court: What was that last that you read there?

Mr. Goldstein: "Were you supposed to go out with whisky?" A. "If we had to, yes." Q. "Were you supposed to go out with whisky?" I repeated the question: A. "When we had to." Q. "Well, did you go with whisky on an expedition. A. "Sometimes." Q. "Well, who furnished you with the whisky?" A. "Mr. Gates bought it." Q. "Well, Mr. Gates would start out on a trip with whisky?" A. "Yes, some of the time." Q. "How many times?" A. "I don't know how many times." Q. "What was the idea of taking whisky in a taxicab?" A. "For this reason, if you want to know." Q. "That is what I am asking you." A. "Because with this on our breath; we took it to our lips —the reason was so we could walk in these places, they wouldn't think we had come from some office."

Court: Are you going to read that whole testimony?

Mr. Goldstein: No, just four more lines.

Mr. Bynon: I object to the reading of this

transcript. Counsel has tried to inject this in the record all the way through in this case. I don't think it belongs here. We are trying this one particular case.

Court: This is for the purpose of impeachment.

Mr. Bynon: Your Honor, why read an entire transcript for the purpose of impeachment as to one thing?

Court: That is what I was inquiring into, whether he was going to read that entire transcript.

Mr. Goldstein: I am not. Just as to the conversation that one afternoon as to the plan of operation.

Court: All right. Go on. Complete what you intend to read.

Mr. Goldstein: Q. "That was the reason. And the other reason was that, when the taxi driver had a drink he told us a good many things and took us a good many places." Q. "That was for the purpose, first, of yourself giving an atmosphere of intoxication when you approached the place?" A. "More or less." Q. "Second, for the purpose of intoxicating and inebriating the taxicab driver to make him look—" A. "We didn't give him enough to make him intoxicated." Q. "Just to make him talkative?" A. "Yes." Q. "So there were two reasons: First, to give yourself an atmosphere of intoxication?" A. "Yes, sir."

Court: That is going too far with that. You are reading that whole testimony into this case. This is for the purpose of impeachment. You

have read two pages there. You are going to ask the witness whether she testified to those two pages?

Mr. Goldstein: Yes.

Court: Then ask her the question.

Mr. Stearns: I would like to suggest this objection: This testimony all went to a subsequent investigation. It had nothing at all to do with this particular case. I am going to ask your Honor to instruct the jury that, so far as that testimony indicated a plan different from the plan—

Court: I understand that this testimony was given in another case?

Mr. Goldstein: Yes, your Honor.

Court: It doesn't have relation to this case at all?

Mr. Goldstein: Except in so far as it shows what her plan of operation was on the afternoon of May 10th.

Court: The objection will be sustained. The court has been misled.

Mr. Goldstein: May I make a statement for the record? This evidence is for the purpose of impeaching the witness as to what took place on the afternoon of May 10th. If your Honor will recall, prior to laying the impeachment question, presenting it to the witness, I asked her whether there was any conference had in the afternoon of May 10th, at which there were present Mrs. Johnson, the sheriff and herself. And she stated no; that the only conference in the afternoon of May 10th was when Mr. Christofferson came to her office with Mr.

Gates, and that she did not see Mrs. Johnson until the night of May 10th. I asked her what were the definite plans of operation discussed or whether there was any specific instruction. She stated the only instruction she received was from Mr. Christoffersen. I am asking her if she did not, at a certain time and certain place, state that on the afternoon of May 10th, which was the afternoon I had been talking with her about, she did not at some certain place, naming the place where she said it, the persons in whose presence she said it, make the following statement, which is contradictory to what she stated, and which is along the line of the theory of the defense. Now, I think I have a perfect right to ask her if she did not make contradictory statements. It doesn't make any difference where she said it, or to whom she said it, if it is contrary to what she said now.

Court: If you are asking this witness as to what was said on the afternoon of May 10th by Mr. Christoffersen or Mr. Hurlburt to her, confine yourself to that time.

Mr. Goldstein: I am; I am asking her all along about the plan of operation that took place on the afternoon of May 10th, as to what they were supposed to do.

Court: Give me that testimony.

Mr. Goldstein: Yes, your Honor. (Hands testimony to court.)

EXAMINATION BY THE COURT

Q. Did Mr. Christoffersen give you instructions that afternoon or that day?

A. Yes, he did that afternoon.

Q. Well, now, did those instructions apply to any particular roadhouse?

A. Those instructions that Mr. Christoffersen gave us in the afternoon for whatever roadhouse we visited.

Q. Well, did they apply to any particular roadhouse?

A. No; they would apply to all of them.

Q. Did he instruct you as to what you were to do in going out to the Twelve Mile House?

A. Well, those instructions he gave us were were general, as I understood it, for all of them.

Q. They were general?

A. Yes, sir.

Court: You may ask as to this, starting with question on page 95, and reading, "Well, I will ask you again" down to the question, "Were you supposed to go out with whisky? A. When we had to," at the top of page 97. I am not going to open up this whole matter on a side issue. You may ask her that as an impeaching question.

Q. I will ask you, Miss Meade, if you did not, on May 10th, 1923, just nine days after this alleged occurrence, in Judge Hawkins' court room in the county court house, Portland, in the presence of Cloyd D. Rauch, a court reporter, and others, give the following testimony: "Q. Well, I ask you again what was your definite duty in this plan of operation? A. To help get evidence. Q. Who told you to do that? A. That is what I was sent for. Q. Who told you to do that? A. Sheriff Hurl-

hurt. Q. Did he himself tell you? A. Yes, sir. Q. Did he give you instructions? A. He gave us instructions, and later, through Mr. Gates. Q. He gave you instructions. A. Yes, sir. Q. And when did he give you those instructions? A. He gave me those instructions in the afternoon. Q. Of May 10th? A. Yes, sir. Q. Where? A. At his office. Q. Who else were present? A. Mr. Gates and Mrs. Johnson. Q. Three of you employes? A. Yes, sir. Q. Now, what were the instructions that the sheriff gave you? A. We were to get evidence from these houses. Q. How were you to get the evidence? A. In a party of three. Q. How were you to get the evidence? A. To buy it. Q. How? A. To buy it. Q. Well, what were you supposed to do? A. We were supposed to go out there in a party and buy this evidence. Q. Were you supposed to go out and drink whisky? A. If we had to. Q. Were you supposed to go out with whisky? A. If we had to, yes. Q. Were you supposed to go out with whisky. A. When we had to."

Mr. Goldstein: Your Honor rules I cannot proceed further?

Court: That is as far as you may go.

Mr. Goldstein: May I take an exception?

UNITED STATES OF AMERICA)
DISTRICT OF OREGON.)

Because of the matters and things set forth in the foregoing stipulation, and because the foregoing testimony should be a part of the Bill of Exceptions

herein, the foregoing stipulation and Supplement to Bill of Exceptions is hereby approved at Portland, Oregon, this 25th day of March, 1925.

CHAS. E. WOLVERTON,
United States District Judge.

UNITED STATES OF AMERICA)
DISTRICT OF OREGON.)

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have compared the foregoing Supplement to Bill of Exceptions with the original thereof, and that the foregoing Supplement to Bill of Exceptions, in the case in which Fred T. Merrill is defendant and plaintiff in error, and the United States of America is plaintiff, and defendant in error, is a full, true and correct transcript of the original thereof, as the same appears of record in my file and in my custody.

And I further certify that the fee for certifying to the within Supplement to Bill of Exceptions, to-wit, the sum of $.................. has been paid by the plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this....................day of March, 1925.

....

Clerk of the District Court of the United States, in the District of Oregon.

No. 4503

In the

United States Circuit Court of Appeals

For the Ninth Circuit

FRED T. MERRILL
Plaintiff in Error

vs.

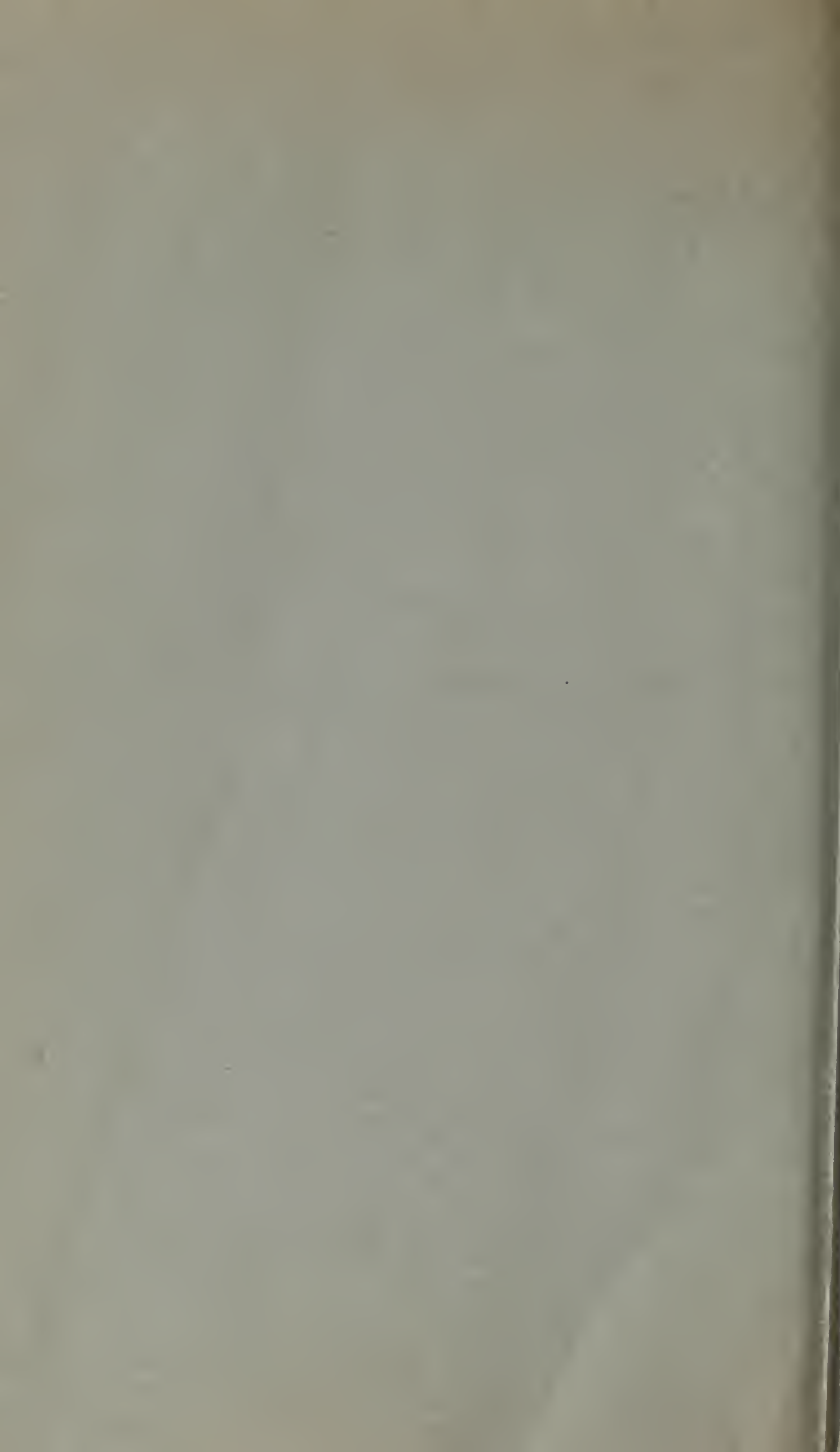
UNITED STATES OF AMERICA
Defendant in Error

Brief for Plaintiff in Error

Upon Writ of Error to the United States District Court for the District of Oregon

BARNETT H. GOLDSTEIN
E. M. MORTON
Attorneys for Plaintiff in Error
1225 Yeon Building,
Portland, Oregon

FILED



INDEX

Page

STATEMENT OF FACTS ... 3

ASSIGNMENTS OF ERROR RELIED UPON ... 6

(1) Insufficiency of Information re affidavit ... 8

(2) Insufficiency of Count I of Information ... 9

(3) Insufficiency of Count III of Information ... 15

(4) Error in re general reputation of premises ... 17

(5) Error in re admitting evidence of prior sales ... 19

(6) Error in re rejecting evidence of conduct of business ... 24

(7) Error in admitting record of conviction of misdemeanor 25

(8) Error in rejecting explanation of such conviction ... 30

(9) Error in restricting cross-examination of M. O. Nelson ... 32

(10-11) Error in restricting cross-examination of A. B. Gates and Ruth Meade ... 34

(12) Error in restricting cross-examination of Martha Randall ... 54

(13) Error in restricting cross-examination of P. V. Rexford 56

(14) Error in restricting cross-examination of T. M. Hurlburt 57

(15) Error in restricting examination of E. W. Aylsworth ... 60

(16) Error in rejecting evidence of general reputation of A. B. Gates ... 64

(17) Error in Instructions ... 71

(18) Error in failure to instruct upon defendant's theory of the case ... 78

CASES CITED:

Allison vs. U. S., 160 U. S. 203 ... 81

Banks vs. State, 89 Ga. 75 ... 83

Benson vs. State, 154 Iowa 313 ... 21

Bird vs. U. S., 180 U. S. 356 ... 81

Brody vs. State, 91 W. W. 801 ... 82

Brotherhood vs. Vickers, 121 Va. 311 ... 70

Brown vs. Perez, 89 Tex. 282 ... 69

Brown, in re, 143 Iowa 649 ... 70

Butler vs. U. S., 278 Fed. 677 ... 15-73

Boyd vs. U. S., 142 U. S. 454 ... 22

Calderon vs. U. S., 279 Fed. 556 ... 81

Cleveland vs. U. S., 281 Fed. 248 ... 13

Cohen vs. U. S., 268 Fed. 420 ... 15-73

Cushenbury vs. State, 157 Mo. 168 ... 69

Day vs. U. S., 220 Fed. 818 ... 21

Di Salvo vs. U. S., 2 Fed. (2nd ed.) 222 ... 51-84

Dowling vs. U. S., 278 Fed. 630 ... 12-16-72-73

Ellsworth vs. State, 30 Ore. 150 ... 33-54

Foley vs. State, 45 N. H. 466 ... 19

Ford vs. U. S., 259 Fed. 552 ... 22

Gallaghan vs. U. S., 299 Fed. 172 ... 51

Glover vs. People, 68 Ore. 464 ... 77

Goldstein vs. Mut. Pac. Ins. Co., 74 Ore. 249 ... 54

Hardy vs. State, 63 Miss. 207 ... 19

Hallowell vs. U. S., 253 Fed. 855 ... 77

Hayden vs. State, 140 Ky., 634 ... 26

Hendry vs. U. S., 233 Fed. 18 ... 81

Henson vs. U. S., 62 Md. 231 ... 19

Herd vs. U. S., 255 Fed. 829 ... 33-53

Hilt vs. U. S., 279 Fed. 421 ... 13-72

Illig vs. U. S., 288 Fed. 939 ... 9-14-72

Jianole vs. U. S., 299 Fed. 499 ... 28-52

Jourdine vs. U. S., Fed. Cases 15499 ... 18

Keck vs. U. S., 172 U. S. 434 ... 12

King vs. U. S., 112 Fed. 988 ... 34

Lewis vs. Boston Gas Light Co., 165 Mass. 411 ... 51

Mah Jim vs. State, 13 Ore. 235 ... 53

Marshall vs. U. S., 197 Fed. 511 ... 22

Morgan vs. U. S., 222 U. S. 274 ... 9

Maxwell vs. Bolles, 28 Ore. 1 ... 54

Oregon Pottery Co. vs. Kern, 30 Ore. 328 ... 54

Powers vs. Commonwealth, 110 Ky. 386 82
Pappas vs. U. S., 292 Fed. 982 78
Reese vs. U. S., 203 Fed. 824 78
Ryan vs. U. S., 216 Fed. 13 78
Saldiver vs. State, 55 Tex. Crim. 177 77
Savage vs. State, 36 Ore. 209 54
Saunders vs. State, 14 Ore. 309 29
Sims vs. Sims, 75 N. Y. 466 31
Smithson vs. S. P. Co., 37 Ore. 88 54
Solomon vs. U. S., 279 Fed. 82 27
Sparks vs. State, 59 Ala. 82 19
Stickle vs. U. S., 15 Fed. 798 31
Street vs. Lincoln Safe Dep. Co., 254 U. S. 88 14-72
State vs. Banks, 89 Ga. 75 83
State vs. Benson, 154 Iowa 313 21
State vs. Brody, 91 Mo. 802 82
State vs. Cushenbury, 157 Mo. 168 69
State vs. Ellsworth, 30 Ore. 150 33-54
State vs. Foley, 45 N. H., 466 19
State vs. Glover, 68 N. E. 464 77
State vs. Hayden, 140 Ky. 634 26
State vs. Hardy, 63 Miss. 207 19
State vs. Henson, 62 Md. 231 19
State vs. Mah Jim, 23 Ore. 235 55
State vs. Powers, 110 Ky. 386 82
State vs. Saunders, 36 Ky. 209 29
State vs. Sparks, 59 Ala. 82 19
State vs. Saldiver, 55 Tex. Crim. 177 77
State vs. Toney, 60 Ala. 97 19
State vs. Trask, 104 Ill. 569 83
State vs. Wilson, 230 Pac. 810 23
State vs. Williams, 144 Ala. 14 26
Trenton Ry. vs. Cooper, 60 N. J. H. 219 77
Trask vs. People, 104 Ill. 560 83
U. S. vs. Allison, 160 U. S. 203 81
U. S. vs. Bird, 180 U. S. 350 81
U. S. vs. Boyd, 142 U. S. 454 22
U. S. vs. Butler, 278 Fed. 677 15-73
U. S. vs. Calderon, 279 Fed. 556 81
U. S. vs. Cleveland, 281 Fed. 248 13-72
U. S. vs. Cohen, 268 Fed. 420 15-73
U. S. vs. Day, 220 Fed. 818 21
U. S. vs. Di Salvo, 2 Fed. (2nd ed.) 222 51-84
U. S. vs. Dowling, 278 Fed. 630 12-16-72-73
U. S. vs. Ford, 259 Fed. 552 22
U. S. vs. Gallaghan, 299 Fed. 172 51
U. S. vs. Hallowell, 253 Fed. 855 77
U. S. vs. Herd, 255 Fed. 829 33-53
U. S. vs. Hendry, 233 Fed. 18 81
U. S. vs. Hilt, 279 Fed. 421 13
U. S. vs. Illig, 288 Fed. 939 9-14-72
U. S. vs. Jianole, 299 Fed. 499 28-52
U. S. vs. Jourdine, Fed. cases 15499 18
U. S. vs. Keck, 172 U. S. 434 12
U. S. vs. King, 112 Fed. 988 34
U. S. vs. Marshall, 197 Fed. 511 22
U. S. vs. Morgan, 222 U. S. 274 9
U. S. vs. Pappas, 292 Fed. 982 78
U. S. vs. Reese, 203 Fed. 824 78
U. S. vs. Ryan, 216 Fed. 13 78
U. S. vs. Solomon, 279 Fed. 82 27
U. S. vs. Stickle, 15 Fed. 320 31
U. S. vs. Wells, 225 Fed. 320 9
U. S. vs. York, 299 Fed. 728 52
Toney vs. State, 60 Ala. 97 19
Wells vs. U. S., 225 Fed. 320 9
Wilson vs. State, 230 Pac. 810 23
Williams vs. State, 144 Ala. 14 26
York vs. U. S., 299 Fed. 728 52

No. 4503

In the

United States Circuit Court of Appeals

For the Ninth Circuit

FRED T. MERRILL
Plaintiff in Error

vs.

UNITED STATES OF AMERICA
Defendant in Error

Brief for Plaintiff in Error

STATEMENT OF FACTS

On May 10th, 1923, one A. B. Gates and two women visited a place known as the PLANTATION INN or TWELVE MILE HOUSE, in Multnomah County, Oregon. This Inn has, for the past 20 years been conducted and operated as a chicken

dinner establishment, and has been for many years past and still is owned by Mrs. Merrill, but managed by her husband, the defendant, a man about 66 years of age. Between the years 1914 to 1922 inclusive, the premises were leased to and were under the exclusive control of outside parties.

According to the testimony of the chauffeur Underwood, who drove the party to the place, Gates represented himself to be a cattle-man, and on the way out, produced and drank from a pint bottle containing moonshine which he invited the chauffeur to share with him. (Trans. p. 140.) Upon their arrival at the Inn, Gates ordered chicken dinners for the party, which were furnished. While at the Inn, he feigned intoxication, and his women companions provided entertainment by playing the piano and dancing with the other guests and generally permitted the impression that they were loose and dissolute women. It was on that occasion and under those circumstances, that Gates claimed that liquor was sold to him by the defendant, which alleged sale was made the basis of this prosecution.

Gates was not a cattle-man, but a prohibition agent, employed by the Sheriff, who furnished the two women, under general instructions to visit and investigate some seven or eight so-called Road Houses, in the vicinity of Portland. The women were paid $50.00 apiece, as well as their expenses incident to getting results under their employment.

The same general tactics of sham and trickery were employed by Gates and the women with respect to the other establishments which were visited at or about the same time. The defendant sought to prove that on one occasion Gates brought his own liquor to the place, drank it and caused the arrest of the proprietor for maintaining a nuisance, based upon the very same liquor that he himself had introduced for the sole purpose of bringing about an arrest. This fact, however, we were prevented from establishing at the trial, through a ruling of the trial court, which among other rulings is assigned as error, and which will be discussed under its appropriate heading.

On May 15th, 1924, acting upon the information of Gates, a raid was staged at the Plantation Inn, and while Mrs. Merrill was ill in bed and in the absence of Mr. Merrill, it was claimed by the Sheriff's Office, who conducted the raid, that they found secreted under the steps of a small veranda facing the second floor of the Inn, some ten bottles of liquor. Who put them there; how long they had been there, or whether they were cached there during the years 1914 to 1922, when not under defendant's control, they did not know.

Upon these facts being presented to the Assistant United States Attorney, he swore to an information containing three counts, charging; (1)—Possession. (2)—Sale, and (3)—Maintenance of a

nuisance, in violation of sections 3 and 21 of the National Prohibition Act, the date of each of these violations being fixed as of May 10th, 1923. Upon trial the defendant was convicted on all three counts and sentenced to 6 months in the County Jail and to pay a fine of $250.00, from which judgment this appeal is prosecuted.

ASSIGNMENTS OF ERROR RELIED UPON

1. Insufficiency of Information, on the grounds that same is not supported by affidavit showing probable cause. (Assignment No. 1.)

2. Insufficiency of Count One charging Possession on the ground that same does not state facts sufficient to constitute an offense. (Assignment No. 2.)

3. Insufficiency of Count Three charging Nuisance, on the ground that same does not state facts sufficient to constitute an offense. (Assignment No. 3.)

4. Error in admitting testimony of M. O. Nelson as to general reputation of Plantation Inn. (Assignment No. 3.)

5. Error in admitting testimony of W. H. Nickell as to prior sales. (Assignment No. 5.)

6. Error in refusing to admit evidence on behalf

of defendant as to conduct of business. (Assigment No. 34.)

7. Error in admitting record of judgment of conviction of defendant on September 6th, 1910, showing misdemeanor, (Assignment No. 6.)

8. Error in refusing to permit defendant to explain said record of conviction. (Assignment No. 7.)

9. Error in restricting cross examination of M. O. Nelson. (Assignment No. 4.)

10. Error in restricting cross examination of A. B. Gates. (Assignments Nos. 9 to 20 inclusive.)

11. Error in restricting cross examination of Ruth Meade. (Assignment Nos. 21 to 24 inclusive.)

12. Error in admitting and restricting certain testimony of Miss Martha Randall. (Assignment Nos. 25 and 26.)

13. Error in restricting cross examination of P. V. Rexford. (Assignment No. 29.)

14. Error in limiting cross examination of T. M. Hurlburt. (Assignment No. 38 and 39.)

15. Error in refusing to permit E. W. Aylsworth to explain his testimony as to general reputation of Plantation Inn. (Assignment No. 36.)

16. Error in refusing to admit evidence of general reputation of A. B. Gates for truth and veracity. (Assignment No. 32.)

17. Error in the instructions given and refusal to give requested instructions. (Assignments Nos. 40 to 50 inclusive.)

18. Error in refusing to instruct the jury upon the defendants theory of his defense in the case.

    (Assignment No. 48.)

I.

Insufficiency of Information on the Ground That It Is Not Supported by Affidavit Showing Probable Cause. (Assignment No. 1.)

The conviction in this cause was based upon an Information which, as appears from the transcript (page 6) is not supported by an affidavit of one having personal knowledge of the facts charged therein, but is simply sworn to by the Assistant United States Attorney to whom the case was referred.

The right of the District Attorney to file Informations for misdemeanors is conceded, provided leave therefor is first secured from the Court. It is assumed that the Court granted such leave. However, it is our contention that the Information filed in this case was insufficient to base any conviction against the defendant herein.

As stated in the case of *U. S. vs. Morgan*, 222 U. S. 274,

> "He cannot be tried on an information unless it is supported by the oath of someone having knowledge of the facts showing the existence of probable cause."

In the case of *U. S. vs. Wells*, 225 Fed. 320, acting under the authority of the decision in the case of *U. S. vs. Morgan,* supra, the court held,

> "That an information signed by the United States Attorney is not sufficient although he is a sworn official of the Government."

In the case of *U. S. vs. Illig,* 288 Fed. 939, the court said,

> "An information for violation of the prohibition act should issue only upon competent evidence and proper affidavit stating facts and not conclusions in order to comply with the constitution of the United States, Amendment IV."

II.

Insufficiency of Count One Charging Possession, on the Ground that the Same Does Not State Facts Sufficient to Constitute an Offense. (Assignment No. 2.)

Count I of the Information charges that on, to-wit, the 10th day of May, 1923, at the Plantation Inn, the defendant had in his possession a quantity

of intoxicating liquor, fit for beverage purposes, in violation of the National Prohibition Act.

This count is clearly insufficient. The mere possession of liquor by itself is not made a crime by the 18th Amendment, nor does Congress attempt to make it such by the Prohibition Act. All that Congress has done, or for that matter could do, under the limitations imposed by the Constitutional Amendment, was to make the possession of liquor illegal only when used for the purpose of effecting that which the amendment prohibited, to-wit: the manufacture, sale, transportation, importation or exportation of intoxicating liquor.

The Eighteenth Constitutional Amendment reads as follows:

> "After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited."

All that Congress, therefore, could do, was to put this amendment into effect, and it certainly could not enlarge on it by making the mere possession of intoxicating liquor, stripped of every other fact, a crime.

Section 3 of the National Prohibition Act, under which this count is predicated, reads as follows:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or posses any intoxicating liquor except as authorized under this act."

Construed in the light of the Constitutional Amendment, this acts seeks only to condemn the possession of intoxicating liquor when used as a means to effectuate the manufacture, sale or transportation of intoxicating liquor as thus prohibited. That this was so intended is borne out by the provisions of Section 33 of the National Prohibition Act which reads as follows:

> "After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this title."

In other words, the mere possession of liquor in and by itself, while it may be charged against the possessor as a rule of evidence, cannot, however, be construed as a crime unless there is connected therewith the charge of manufacture, sale or transportation which must be the ultimate result of the possession. Therefore, it must follow, that to charge

a crime against the National Prohibition Act, the illegality of the possession must be made apparent from the facts set forth therein, to-wit; that the liquor was possessed for the purpose of sale or transportation or was the product of illegal manufacture.

All this count says, is that the defendant possessed intoxicating liquor for beverage purposes *in violation of the National Prohibition Act.* The words italicized amount to no more than to say that the alleged possession was contrary to law.

In *Keck vs. U. S.,* 172 U. S. 434, it was charged that the defendant did "knowingly, wilfully and unlawfully, import and bring into the United States, to-wit: in the Port of Philadelphia, diamonds" of a stated value "contrary to law and the provision of the act of Congress in such case made and provided." The Supreme Court held that the allegations were insufficient as being too general and not giving the defendant the requisite information of the nature of the accusations against him.

In the case of *U. S. vs. Dowling,* 278 Fed. 630, the defendants therein were charged with a conspiracy to possess intoxicating liquor contrary to the provisions of the National Prohibition Act. The court held this charge insufficient. In its opinion, the court said:

"It is apparent that the mere possession of

intoxicating liquor is all that is charged. * * * It is clear that Congress is without authority to make the mere possession of intoxicating liquor, stripped of every other fact or incident, a crime. * * The Act (Volstead Act) cannot be said to denounce possession, isolated from all other facts or circumstances, as an offense, and if it did, it would exceed the power conferred upon Congress by the 18th Amendmend."

In the case of *Hilt vs. U. S.*, 219 Fed. 421, the Circuit Court of Appeals for the Fifth Circuit reversed a judgment of conviction on the ground that an indictment charging mere possession of liquor was insufficient. The court said:

> "Neither of the counts mentioned state any fact or facts showing that the alleged possession was accompanied by such a purpose or intent, or was under such circumstances as to render it a violation of law."

In the case of *U. S. vs. Cleveland,* 281 Fed. 248, it was held that it was not sufficient in an indictment for unlawful possession, to merely allege possession of liquor for defendant and its intended use thereof as a beverage. In its opinion the court said:

> "As long as the Act recognizes the right of possession and use at certain places and makes such possession illegal only at other places, then an indictment to be sufficient should state the time and place where the possession was illegal."

In the case of *U. S. vs. Illig*, 288 Fed. 939, it was held that an information charging that the defendant did unlawfully and wilfully have and possess a large quantity of intoxicating liquor without being authorized so to do in the manner provided by the National Prohibition Act was insufficient. In its opinion the court said:

> "The pleader wholly ignores the fact that the possession of intoxicating liquor is not made an offense by the Eighteenth Amendment; that Congress did not attempt in the Volstead Act, nor would it have the power, to make the mere possession stripped of every other fact, a crime. Possession can only be made an offense when prohibited for the purpose of making effective that which the Amendment prohibits."

In the case of *Street vs. Lincoln Safe Deposit Company*, 254 U. S. 88, the Supreme Court held;

> "That to render possession of liquor illegal is conditioned by the intended use in violation of the act, which as seen must bear some relation to manufacture, sale, transportation, importation, etc.,"

and Mr. Justice McReynolds, in his short concurring opinion, said:

> "Manufacture, sale and transportation are the things prohibited—not personal use."

III.

Insufficiency of Count Three, Charging a Nuisance, on the Ground that the Same Does Not State Facts Sufficient to Constitute an Offense. (Assignment 2.)

Count 3 of the information charges that on, to-wit: May 10th, 1923, the defendant, at the Plantation Inn, maintained a common nuisance, wherein intoxicating liquor for beverage purposes was then and there being kept and sold.

Section 21 of the National Prohibition Act upon which this count is predicated, has been frequently construed by the federal courts as requiring a habitual or recurrent sale, and that a general allegation that liquor has been and is being sold and kept for sale therein, is insufficient.

In the case of *U. S. vs. Cohen*, 268 Fed. 420, it was held that under Sec. 21 of the Volstead Act, declaring a place for the unlawful sale of intoxicating liquor to be a nuisance, it must appear that the sales therein were continuous or recurrent. In its opinion the court said:

> "I conclude that the use of the words 'sold, kept or bartered' in violation of the law, mean their repeated or continuous or recurrent sale or barter."

In the case of *U. S. vs. Butler*, 278 Fed. 677, the

court held that a bill to enjoin a nuisance must set forth the facts which constitute the nuisance, and that if a sale of liquor on the premises is alleged, it must appear that it was sold repeatedly, continuously and recurrently, and a general allegation that liquor has been and is being sold and kept for sale, is insufficient.

In the case of *U. S. vs. Dowling*, 278 Fed. 630, p. 643, the court said:

> "There is no showing of the maintenance of a nuisance. It may be said that, not only is there no showing that intoxicating liquors were kept in violation of the act, or in such manner as to come within the definition of a nuisance as contained in Section 21, but the allegations which should be present to show maintenance were also wanting. The word "maintenance" implies continuance, and the act implies it from the use of the word 'keep'."

The case of *U. S. vs. Dowling,* supra, also cites with approval and adopts the ruling laid down in the case of *Commonwealth vs. Peterson,* 138 Mass. 498, which is as follows:

> "The proprietor of a building cannot be said to keep or maintain a common nuisance on the strength of a single casual sale. To keep or maintain imply a certain degree of permanence."

The charging part of this count is bare of any facts and states mere conclusions to support the

same. If the test of a statutory nuisance, as defined by Sec. 21, is a place where liquor is continuously or recurrently sold or maintained, as would appear from the above authorities construing the section then it must naturally follow that to charge such a nuisance as would be in violation of law, an appropropriate averment of such facts, not mere conclusions, should be alleged. This has certainly not been done in this case.

IV.

Error in Admitting Testimony of M. O. Nelson as to General Reputation of Plantation Inn. (Assignment 3.)

M. O. Nelson was called as a witness for the Government, and was permitted, over objection of the defendant, to testify in the Government's case in chief, as to the bad reputation of the Plantation Inn, as a place where intoxicating liquor was continuously kept and dispensed. (Transcript page 45.)

This testimony, if inadmissible, was clearly prejudicial to the defendant.

It is assumed that the only theory upon which it will be argued that this testimony was admissible, was to prove the charge that the defendant maintained a common nuisance.

The rule as to this sort of testimony is laid down in 33 C. J. 755:

"Evidence of the general reputation of a place is not admissible, except where a *statutory* provision makes such reputation a pertinent fact in the prosecution and declares it to be competent evidence."

The danger of this testimony to the defendant must be readily apparent. It is true that in some of the State Prohibition Acts, and particularly the Oregon Prohibition Act, express provision is made for the introduction of this testimony, but the Volstead Act, under which this prosecution was brought, permits of no such latitude, and, therefore, we contend that in the face of this absence of express statutory authority, it was clearly indefensible to so extend the provisions of the Act as to permit the introduction of testimony that, under general circumstances, would not only be plainly inadmissible to prove a specific violation, but in the nature of this case, would be highly prejudicial.

In the case of *U. S. vs. Jourdine,* Fed. Cas. 15499, the court held that upon an indictment for keeping a disorderly house, the prosecution could not introduce in evidence the general reputation of the place.

In the case of *State vs. Boardman*, 64 Maine, 523, 528, the opinion read:

"The defendant is indicted for keeping a house of ill fame, resorted to for the purpose

of prostitution and lewdness. The offense charged is that of a common nuisance. The gist of the offense consists in the use, not in the reputation of the house. Its reputation for lewdness and prostitution may be ever so clearly established, and yet if the evidence does not show that it was in truth used for those purposes, the first element in the offense is not proved; but if that is made out, it is immaterial what the reputation of the house was, or whether it had any. *The reputation of the house, under our statute, makes no part of the issue.* Testimony as to its reputation has no tendency to establish the issue that it was in fact used as a house of ill-fame, and is inadmissible as mere hearsay evidence. On trial of an indictment for a nuisance, it is not admissible to show that the general reputation of the subject of the nuisance charged was that of a nuisance.

The following authorities likewise support our contention that evidence of general reputation was not admissible:

State vs. Foley, 45 N. H. 466.
State vs. Henson, 63 Md. 231
State vs. Hardy, 63 Miss. 207.
State vs. Sparks, 59 Ala. 82.
State vs. Toney, 60 Ala. 97.

V.

Error in Admitting Testimony of W. H. Nickel as to Prior Sales. (Assignment No. 5.)

Over the objection of the defendant, the Government permitted to call in its case in chief, one W. H. Nickel, who testified that in April, 1923, he was employed as a waiter by the defendant at Plantation Inn for a period of from 10 to 12 days, and that while so employed the defendant sold liquor on said premises. (Transcript, page 47.)

The defendant was not charged in the Information with this offense, it occurring some three or four weeks prior to May 10th, 1923, the Information being confined exclusively to the Gates episode. The court, however, admitted the Nickel testimony on the theory that it was pertinent to the charge of maintaining a nuisance.

By whatever name it may be called, the fact remains that this was evidence of a distinct and separate offense, entirely different and independent from the one charged, and under the general rule, clearly inadmissible and highly prejudicial. It is not difficult to understand how such evidence might prejudice a jury, and bring about a conviction, because the jury might believe that he is at least guilty of this other offense, especially in a case of this character where the evidence of the Gates episode was conflicting, and was subject to the defense of entrapment and improper methods used in effecting the arrest of the defendant. Surely the defendant should not have the burden of defending against a separate and different offense introduced in evi-

dence, for which he was not indicted, nor informed against, and which had no tendency to prove the specific charge for which he is on trial.

The rule is stated thus in 16 C. J. 607:

> "On a trial for maintaining a liquor nuisance, proof of unlawful sales of intoxicating liquors by accused is admissible to show the intent with which the liquors were kept on the premises, but the proof *must not include sales prior to the period charged.*"

In the case of *State vs. Benson,* 154 Iowa 313, 134 N. W. 851, the court said:

> "The defendant was accused in the indictment of having maintained a place wherein intoxicating liquors were kept for sale and sold contrary to law between March 1, 1909, and February 24, 1911, the time of finding the indictment. On trial, testimony of three witnesses that he had sold whiskey prior to March 1, 1909, was received over objection. This was error which was not obviated by the seventeenth instruction in which the jury was told that such testimony should be considered by them only as it may tend to throw light on the intentions and motives of defendant in making sales between the 1st day of March ,1909 and the 24th day of February, 1911, and as to whether such sales were made for medicinal purposes or as a beverage."

In the case of *Day vs. U. S.* 220 Fed. 818, the court said:

> "It is a familiar and long established rule that similar acts or misdeeds of the accused are inadmissible against him, except where they are material in proof of some necessary element of the offense for which he is on trial. This rule is laid down by all the writers and in numberless decisions."

In the case of *Ford vs. U. S.* 259 Fed. 552, it was held:

> "The danger of this kind of evidence is that it is likely to lead the jury aside from the case on trial, confuse the issues ,and result in a conviction for acts not included in the indictment."

In the case of *Marshall vs. U. S.* 197 Fed. 511, it was held:

> "If an act is shown to be illegal, it is enough. The prosecutor may safely rest on such proof; it does not add to its illegal character to show that it was repeated."

In the case of *Boyd vs. U. S.* 142 U. S. 454, the court said:

> "On the trial of a person indicted for murder, it appeared in evidence that the killing followed an attempt to rob. The court admitted, under objections, evidence tending to show that the prisoner had committed other robberies in the neighborhood, on different days,

shortly before the time when the killing took place. Held that the evidence was inadmissible for any purpose."

In the case of *State vs. Wilson,* (Ore.) 230 Pac. 810, it was said:

"One class of objections to the procedure of the court is that the prosecutrix was allowed to testify, over the objection and exception of defendant, that she became pregnant by him, and that he performed two separate and distinct operations upon her, resulting in the death of the fetus with which she was at the time pregnnat, prior to the one named in the indictment. This is contrary to the rule laid down in this state. * * * * One consequence of supporting the procedure allowed in this respect by the trial court would be that no defendant could know how many violations of the law he would be called upon to defend upon a single charge; neither would he know when his prosecutions for some offense would come to an end. Another result would be that, having narrated in testimony all the instances constituting separate offenses, and failing in the prosecution of one, the state could take precisely the same evidence, and, by changing the date of the indictment, prosecute a defendant on the same testimony an indefinite number of times. The statute contemplates the statement in the indictment of a single offense, and that the evidence shall be confined to that charge alone of which the defendant has been informed. The principle is settled in this state by the precedents cited."

VI.

Error in Refusing to Admit Evidence on Behalf of Defendant as to Conduct of Business. (Assignment 34.)

Russell Underwood, a witness for the defendant, testified that he was employed by defendant, beginning on May 11th, and for a period of 2½ months thereafter. During his examination the following proceedings were had:

> Q. As such waiter, did you receive any instructions from Mr. Merrill concerning liquor or the use of liquor by the guests?
>
> Mr. Stearns: Just a moment, if your Honor please. If that question is confined to the time prior to Mr. Merrill's arrest, I have no objection; but if it is since then it would be a self-serving declaration, and would not be admissible, I think.
>
> Mr. Goldstein: This is prior to May 15th, which is one of the alleged acts of nuisance. He was working prior to that time. I imagine your Honor would rule I could prove anything immediately prior, immediately subsequent, so long as it is close enough to the alleged occurrence of the nuisance to show how the place was being conducted.
>
> Court: Confine it to the 15th.
>
> Mr. Goldstein: May I have an exception to your Honor's ruling?
>
> Court: Yes.
>
> Mr. Goldstein: I understand the court has

ruled that I cannot show by this witness the method of conducting the place of business immediately after May 15th?

Court: No.

Mr. Goldstein: I will take an exception to your Honor's ruling.

(Transcript, 142, 143.)

In our opinion, it is inconsistent for the court to permit the testimony of Nickel as to sales made months before the date charged in the information, upon the question of nuisance, and yet not permit the defendant to prove the conduct of business immediately following the date of the occurrence, upon the same question of nuisance.

VII.

Error in Admitting Record of Judgment of Conviction of Defendant on September 6th, 1910, *Showing Misdemeanor.* (Assignment 6.)

The court permitted the Government, over objection to show that the defendant had been convicted of a misdemeanor in 1910 (Abstract, page 132.)

Upon taking the stand in his behalf, the defendant was cross-examined by the Government as to whether he had not been convicted of a crime, and for the purpose of discrediting his testimony, there was permitted to be introduced in evidence a cer-

tified copy of the record of conviction. It developed that some 13 years prior to this trial, the defendant had entered a plea of guilty to a simple misdemeanor, for which he was fined.

The offense which the defendant was alleged to have committed in 1910, aside from being remote and in no wise connected with the specific offense charged in 1923, or with the Volstead act, upon which it was found, did not even rise to the dignity of a felony, but at most was a misdemeanor of a trivial character.

We contend that the court erred in admitting this record of conviction of a misdemeanor, for the purpose of impeaching the credibility of the defendant.

> "A witness cannot be asked if he has been convicted of a crime, in a particular court where the statutes permit him to be examined only as to certain infamous crimes."
>
> (Wharton on Criminal Evidence, page 558.)

In the case of *Hayden vs. Commonwealth,* 140 Ky. 634, it was held:

> "Credibility may be impeached only by showing conviction of a felony."

In the case of *Williams vs. State,* 144 Ala. 14, it was held:

> "Evidence of conviction of crime not in-

famous is not proper subject of proof for purpose of affecting credibility."

In the case of *Solomon vs. U. S.* 297 Fed. 82, the head note reads as follows:

> "The record of the conviction of a witness of a misdemeanor, which would not under the General Common Law, or the Common Law of the State, have rendered him incompetent as a witness, is not admissible to effect his credibility."

Under the Common Law, a defendant in a criminal case was not a competent witness and, prior to the act of Congress of March 16th, 1878 (20 St. L. 37—U. S. Comp. St. 1465), by which a defendant was made a competent witness in a criminal case, no record of conviction of an offense found against him in a Federal or State Court, could be introduced in evidence, to impeach his credibility, and that having been made a competent witness by statute, such evidence could not be used, except where there is a statute of the United States permitting it, *or where, by the law of the state in which the trial was had, such evidence was admissible when the courts of the United States were established by the judiciary act of* 1789. So far as the State of Oregon is concerned, the laws thereof would have no application, for Oregon was not admitted into the Union until 1859.

There is no Federal statute authorizing the use of this evidence, and the question then arises, what were the crimes at common law, the nature of which a record of adjudication would render a witness incompetent and may not be used to affect his credibility.

At common law, in criminal cases, in addition to defendants, persons convicted only of crimes which rendered them infamous were excluded from being witnesses, and by the term "infamous" is meant crimes of treason, felony and *Crimen Falsi.* (Wharton on Criminal Ev., page 730.) For a long time no such person was permitted to testify in the Federal courts, and this disqualification was only removed through the decision announced in the recent case of *Rosen vs. U. S.* 245 U. S. 467. However, while a person who had been convicted of an infamous crime, may now be a witness in the Federal court, it must necessarily follow that only the conviction of an infamous crime may be proved to effect credibility. (Wharton on Criminal Ev., page 731.)

In the case of *Jianole vs. U. S.*, 299 Fed 499, the trial court in that case allowed the defendant, over objection, to be questioned in regard to a former plea of guilty to the charge of unlawful manufacture of liquor. The testimony referred to showed that the defendant had pleaded guilty to a misdemeanor a year and a half before the date of the

alleged felony, (Conspiracy to violate the prohibition act), for which he was then on trial. The Appellate court, in holding this testimony incompetent, said:

> "There was no connection between the two, either in respect of time or similarity of offense."

While the record of conviction, introduced in this case, of the offense committed in 1910, is of a simple misdemeanor and even that, of the most trifling character, yet the effect thereof upon the jury was undoubtedly as strong as if the defendant had been guilty of the most heinous crime, and therefore, if inadmissible, was clearly prejudicial.

The vice of showing that in the 66 years of defendant's life there was this blot some 13 years past, even though remote, is clearly set out in the case of *State vs. Saunders,* 14 Ore. 309.

> "Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs—no matter what explanation of them he attempts to make—it will be more damaging evidence against him and conduce more to his conviction than direct testimony of his guilt in the particular case. * * * * * * * The judge might demurely and dignifiedly tell the jury that they must disregard the evidence, except so far as it tended to impeach the testimony of the party; but what good would that

do? And it is not all improbable that he himself would imbibe some of the prejudice which proof of the character referred to is liable to engender."

VIII.

Error in Not Permitting the Defendant to Explain Record of Conviction. (Assignment No. 7.)

After the Government was permitted to introduce in evidence, for the purpose of discrediting the testimony of the defendant, a record of conviction of a petty misdemeanor, alleged to have been committed some 13 years prior to the trial, the Defendant sought to explain same, but was peremptorily stopped by the court:

> Court: "I do not think the witness can deny the record, and it is not necessary for him to go into it, I will not permit it."
>
> Mr. Goldstein: May I have an exception? (Transcript page 133.)

In Wharton on Criminal Evidence, page 1015, 1238, the rule is stated thus:

> "A record of conviction, when offered to disqualify a witness, cannot be impeached, but when a record of conviction is offered for the purpose of *discrediting* (not excluding) a witness, it may be impeached.
>
> Even supposing that it is admissible at common law to put in evidence in order to discredit a witness, his conviction of the specific

crime, a record, when admitted, in so far as concerns the parties to the suit is res inter alios acta (a thing done between others), and hence it is open to impeachment by proof of the witness's innocence and the judgment so far as it affects persons not parties to the record and who could not have become parties, is res inter alios acta and if admissible at all, is open to impeachment."

The same rule is stated in 16 C. J. 592.

"When evidence of other crimes has been introduced, defendant is entitled to explain transactions. He may explain why he pleaded guilty."

In the case of *Sims vs. Sims*, 75 N. Y. 466, 475, it was held that a fact proved by a record of conviction is not conclusive, but may be rebutted.

In the case of *U. S. vs. Stickle*, 15 Fed. 798, the court, in instructing the jury upon the record of a former conviction introduced to discredit the defendant, said:

> "And of course, it will be proper for you to consider the statements of the defendant in regard to his pleading guilty to that charge, that he did it to save expense, etc. Of course, a person charged with a crime might plead guilty and suffer a conviction when he fully believes himself to be innocent. Whether he did so or not it will be proper for the jury to consider in this part of the case."

The jury in this case had no opportunity to consider the statement of the defendant as to his plea of guilty to the 1910 judgment, for the court prevented it from being made, to the defendant's evident prejudice. That he had an explanation to make is apparent from the transcript, indicating the numerous attempts made by the defendant to do so, which in every instance, was promptly suppressed by the court. In this, we contend, the court was in error, and that it was prejudicial, needs no comment.

IX.

Error in Restricting Cross Examination of M. O. Nelson. (Assignment No. 4.)

On cross-examination, a Government witness, M. O. Nelson, was asked whether he had ever discussed the case with Mr. Hurlburt (the Sheriff); whether it was not a fact that the witness had urged the trial of the defendant at Gresham, before his neighbors; how many editorials he had written on the subject of the defendant, and the Plantation Inn (it having been developed that he was an editor of the "Portland Telegram"), to all of which questions objection was interposed by the Government and sustained by the court. (Trans. pp. 46-47.)

While it may be conceded that as a general rule, the trial court is vested with considerable latitude in limiting the scope of an examination, yet, at the

same time, it must likewise be conceded that a full cross-examination, within proper limits, is not a mere privilege, but is an absolute right, and a denial of this right is prejudicial. (*Herd vs. U. S.,* 255 Fed. 829.)

It is always permissible to show interest, bias, and prejudice of a witness! Would not the fact that he discussed the case with the Sheriff who furnished the people responsible for this prosecution, be of importance in determining the interest of Nelson? Would not the fact that he had written editorials that molded public opinion against the defendant, be of importance in determining the bias and prejudice of Nelson?

As stated in the case of *State vs. Ellsworth,* 30 Ore. 150:

> "A jury is entitled to know the bias of a witness and the extent to which his feelings are enlisted in the cause, so that they can fairly interpret the weight to be given to his testimony, and for the purpose of ascertaining his opinion it is proper to ask on cross-examination, if he had not expressed a certain feeling, or used a certain expression concerning a case."

The rule in Federal Courts is thus stated by Zoline on Federal Criminal Law and Procedure, pages 316-318:

> "A full cross-examination of a witness upon

the subject of his examination in chief, is an absolute right, not a mere privilege of the party against whom he is called, and a denial of this right is a prejudicial and fatal error."

In the case of *King vs. U. S.*, 112 Fed. 988, 995, the court said:

> "In the cross-examination of witnesses in criminal cases a wide latitude is permitted. It is always permissible to show the interest, bias and prejudice of the witness, and to inquire about any and every relevant and material matter to the issue in controversy which tends to throw any light upon the feelings of the witness or explains or makes clear his situation with respect to the defendant, in order that the jury may be fully informed of all the facts and circumstances tending to throw light on the weight and importance of the evidence as given."

X—XI.

Error in Restricting and Limiting Cross-Examination of A. B. Gates and Miss Ruth Meade, Witnesses for Government. (Assignments 9 to 24, inclusive.)

As already indicated, the prosecution was based upon the testimony of three informers, who, according to their admitted testimony, feigned intoxication and pretended to be fast and dissolute characters, in order to bring about the arrest of this defendant on the charge of violating the liquor laws.

The charge in the information was based entirely upon the testimony given by these informers, and the conviction, to be sustained, must of necessity have been obtained because of the credit given by the jury to their testimony; it was, therefore, most important to the defendant that his right to a fair and full examination of these witnesses be respected by the trial court. This right, however, was denied him.

It was the theory of the defense, that the liquor introduced in evidence by the Government as having been purchased from the defendant, was liquor which these informants had themselves carried upon the defendant's premises. In this connection, attention is called to the testimony of Russell Underwood, the chauffeur who conveyed these people to the Plantation Inn. Underwood, in brief, testified that enroute to this place, Gates represented himself as a cattle man, produced a bottle of liquor from which he drank and likewise invited Underwood so to do; that upon reaching the place, Mr. Gates, pulled out a bottle of liquor and set it on the bar, which the defendant ordered him to remove; that Underwood saw no liquor upon the premises except that in the possession of Gates. (Trans. 141-142.)

It was further contended by the defendant, and the cross-examination was attempted to elicit this fact, that immediately preceding and following this visit to the defendant's premises, Gates had visited

some 7 other alleged roadhouses, and that at least on one occasion, the liquor nuisance charge was predicated entirely upon the liquor that Gates himself had introduced and drank thereat.

It was further contended by the defendant, that all these prosecutions of so-called roadhouses, made within the course of two or three successive days, were the result of certain general instructions received from the Sheriff of Multnomah County, who advanced the expenses of bringing about these prosecutions. This was in fact admitted by Miss Meade under examination by the court:

> O. Well, now, did those instructions apply to any particular roadhouse?
>
> A. Those instructions that Mr. Christoffersen gave us in the afternoon for whatever roadhouse we visited.
>
> Q. Well, did they apply to any particular roadhouse?
>
> A. No, they would apply to all of them.
>
> Q. Did he instruct you as to what you were to do in going out to the Twelve Mile House?
>
> A. Well, those instructions he gave us were general, as I understood it, for all of them.
>
> Q. They were general?
>
> A. Yes, sir.

(Supplement Transcript, page 4.)

It must, therefore, be readily seen, that it was important to ascertain what these instructions

were, how they were carried out, and if Gates, in order to procure a violation of the liquor law, was the producing cause of the liquor which was made the basis of those prosecutions.

The following excerpts of the testimony will indicate more clearly the defendant's contention in this regard, and the court's attitude in stifling the cross-examination of a material witness, whose confessed practice of sham and trickery, in and by itself, warranted the most rigid and careful scrutiny of the jury as to his credibility.

Mr. Gates had stated that he was a detective for about 30 years, and for 2 years had been employed as a detective by the Anti-Saloon League; that at the time of the investigation of the Plantation Inn, he was a prohibition agent, but was receiving instructions from the Sheriff; (Transcript, 59.) that his two female associates were assigned to him by the Sheriff, (Transcript, 60) and that enroute to, and upon his arrival at, Plantation Inn, he feigned intoxication and represented himself to be a cattle man out for a good time; (Transcript 58). On cross-examination the following proceedings were had:

> Q. Well, then there was something discussed between you and the Sheriff's office as to how the investigations were to be handled?
>
> A. No, sir.
>
> Court: I don't think you need go into that. It is enough that this man was employed by the Sheriff to do detective work and was assigned to this matter.

Mr. Goldstein: I want to know what the employment was supposed to contemplate—whether it was supposed to contemplate taking the women out with him, or what control he had over the women.

Court: He has already said they furnished him these two women, and I think that is enough.

Q. On May 10th, prior to going out to Mr. Merrill's place, you had a conversation with Mr. Hurlburt or Mr. Christoffersen or someone in the Sheriff's employ, with respect to the two women that you were to take out with you, did you not?

A. Yes, sir.

Q. Now, at that time were you informed as to what roadhouses you were to investigate?

A. They told me to investigate the road houses, yes sir.

Q. How many road houses did you investigate?

A. I investigated eight of them.

Q. Of all these eight roadhouses you investigated pursuant to that instruction, you went out with these two ladies?

Court: He didn't say eight roadhouses. He has already explained that. He said he went out to investigate roadhouses. I thought he said eight. Pardon me. How many roadhouses did you investigate?

Mr. Bynon: I object to this. We are still trying to try this one case. What happened at other times subsequent to this has no bearing upon the guilt of the accused.

Court: I think you have gone far enough with that.

* * * * *

Mr. Goldstein: * * * * I intend if the court will bear with me, to connect this testimony with positive proof by one of the Government's witnesses that these deliberations and arrangements had been made prior to going out to Mr. Merrill's place, which contemplated doing certain things which are allied with our theory of the defense. As I have aleady stated in my opening statement, I am going to prove by the defense that this man started out with liquor toward the place. He denies he took liquor out there. I want to show an arrangement and agreement that he had with the Sheriff's office, prior to going out there, in certain cases for the use of liquor. In the interest of truth and justice, it it usual to allow considerable latitude in the examination of an adverse witness, especially where the testimony is hostile, etc.

I do feel, honestly and conscientiously, that I ought to have a right to show by this witness that not more than two days afterwards, on the same investigation of similar roadhouses, he went out with liquor to a certain place, and that he consumed liquor on the way out there, and he drank the liquor in that place, and left the empty bottle there with some of the contents, and went back and swore out a warrant against the man for the only liquor there, that had been brought by himself.

That I can prove, if I am permitted.

Court: You will not be permitted to prove that.

Mr. Goldstein: So as to make that clear, I will ask him this question. During the course of his negotiations with the Sheriff prior to going out to Mr. Merrill's place, if at that time there had not been some discussion or understanding as to the methods that he was to use in his investigation of these roadhouses.

Court: You were instructed to make investigations of roadhouses?

A. Yes, sir.

Court: And you went there. You were left to your own course as to what you should do?

A. Yes, sir; they didn't tell me what to do. They left that up to me.

Mr. Goldstein: I propose, if the court please, to discredit that.

Court: Well, you will have to prove it from your own resources, then.

Mr. Goldstein: I can prove that by one of their witnesses. As long as he is on the stand here, I wanted to go into that.

Court: That is as far as you can go with this witness.

(Trans. pp. 61-66.)

Whereupon witness was asked the following question:

"Is it not a fact that, during the course of your investigation of these roadhouses, you did take out liquor with you which you used as the basis for swearing out a warrant of arrest against a party in whose place you brought the liquor?"

To which question objection was made and sustained and exception allowed.

Whereupon the following question was propounded to the witness:

> "Now, I will ask you, Mr. Gates, if at any time prior to May 10th, in making your investigations, you had occasion to use liquor as a means of inducing violations of law?"

To which question objection was made and sustained and exception allowed.

(Trans. p. 68.)

Later, in the course of the cross-examination, the following proceedings were had:

Q. Didn't you, as soon as you arrived at the place, take out a bottle from your pocket and flourish it in the air?

A. No, sir.

A. You didn't do that?

A. No, sir.

Q. You might have done it on other occasions?

Objected to.

Court: I have already ruled on that.

Mr. Goldstein: I will ask him the question, and then, please, may I take an exception in the record, to show the purpose of these questions and to show the methods employed by him along those similar lines I am asking about?

Court: At other places?

Mr. Goldstein: In connection with that particular employment.

Court: The court will not permit you to ask those questions. I have ruled on that once or twice. I tried to make myself plain.

Mr. Goldstein: I understand, if the court please. I want the record to show.

Court: You will not be permitted in this case to go out and examine this witness as to other roadhouses, and what he did at those places. I might as well put a stop to that right now.

Mr. Goldstein: I am not going to pursue that any further as to this witness, only as it might affect his credibility as a witness. That is the only purpose, for the purpose of showing his motive and interest. May I have an exception to your Honor's ruling?

Court: You may have your exception.

(Trans. p. 81-82.)

Again the cross-examination was interfered with as follows:

Q. Now, Mr. Gates, you have been on liquor investigations for how many years?

Court: You have been all over that.

Mr. Goldstein: Just one point.

Court: I think we better put a stop to that now, because he has been over that.

Mr. Goldstein: He says he never took a drink outside of business. Now, I want to find out—

Court: You have been all over that question. There is no use taking up further time of this court with it.

Mr. Goldstein: May I ask one question?

Court: You may ask one question to get it into the record.

Q. On the very first time you went out on a liquor investigation, stating that you had never taken a drink except on business, how did you at that time know the difference between the various kinds of liquor, without ever having had occasion to drink it except on business?

Mr. Stearns: If your Honor please, that question is objected to as incompetent.

Objection sustained.

Mr. Goldstein: May I have an exception?

(Transcript, page 92.)

Miss Meade, who accompanied him on this trip, testified that she had also feigned intoxication and had played the piano at the place for "atmosphere," (Transcript 96-97) and had received $50.00 in a lump sum for her investigations of eight roadhouses, covering a period of three successive days, (Transcript 106-107) and that arrangements were made the afternoon of May 10th, as to what they were to do at these roadhouses. (Transcript page 100). She was then asked the following question:

Q. I will ask you if it is not a fact, that, during those three days investigating those roadhouses, there were three or four times when such liquor was taken out?

Mr. Stearns: Just a moment.

Court: The objections will be sustained to that.

Mr. Goldstein: May I have an exception?

Court: Yes.

(Transcript page 107.)

Q. Isn't it a fact that you played the piano in all these eight roadhouses?

Objected to.

Court: That is objectionable. I have ruled it out several times. I wish counsel would not refer to it again.

Mr. Goldstein: May I have an exception?

Court: You may have an exception, yes.

(Transcript, page 111.)

In this connection, attention is called to her admission under examination by the court, that they had received general instructions covering the investigation of all these roadhouses, and that they did not apply to any particular roadhouse. An attempt was thereupon made, during her cross-examination, to elicit the fact that on a prior occasion she had admitted that part of her instructions were to go out to these places with whiskey, if they had to. While defendant's counsel was permitted to ask this question only after considerable difficulty, and after the court had erroneously stated he had been misled, yet the defendant was prevented from inquiring whether she had not testified on a previous occasion as to the purpose of taking liquor out, and the purpose of giving part of the liquor to the taxi driver. The court is particularly urged to read the Supplemental Transcript, which contains this testi-

mony and indicates the difficulties and obstacles that confronted defendant in exercising his right of cross-examination.

The following excerpts are illustrative:

Q. Well, then, for the purpose of refreshing your recollection, I will ask you if you didn't state—for the purpose of impeachment, I will ask the following question, if you didn't testify on May 29th, just nineteen days after this alleged occurrence, the following, in the presence of Cloyd D. Rauch, a court reporter in Judge Hawkins' court room, the following testimony:

(Page 4.)

* * * * *

Q. "Were you supposed to go out with whisky?" A. "If we had to, yes." Q. *"Were you supposed to go out with whisky?"* I repeated the question: A. *"When we had to."* Q. *"Well,, did you go with whisky on an expedition?"* A. *"Sometimes."* A. *"Well, who furnished you with the whisky?"* A. *"Mr. Gates bought it."* Q. *"Well, Mr. Gates would start out on a trip with whisky?"* A. *"Yes, some of the time."* A. *"How many times?"* A. *"I don't know how many times."* Q. *"What was the idea of taking whisky in a taxicab?"* A. "For this reason, if you want to know." Q. "That is what I am asking you." A. "Because with this on our breath; we took it to our lips—the reason was so we could walk in these

places, they wouldn't think we had come from some office."

(Page 6.)

* * * * *

A. "That was the reason. *And the other reason was that, when the taxi driver had a drink, he told us a good many things and took us a good many places."* Q. "That was for the purpose, first, of yourself giving an atmosphere of inxtoxication when you approached the place?" A. "More or less." Q. "Second, for the purpose of intoxicating and inebriating the taxicab driver to make him look—" A. "We didn't give him enough to make him intoxicated." A. "Just to make him talkative?" A. "Yes." Q. "So there were two reasons: First, to give yourself an atmosphere of intoxication?" A. "Yes, sir."

Court: That is going too far with that. * * * Give me that testimony.

(Pages 7 and 9.)

* * * * *

Court: You may ask as to this, starting with question on page 95, and reading, "Well, I will ask you again," down to the question, "Were you supposed to go out with whisky? A. When we had to," at the top of page 97. I am not going to open up this whole matter on a side issue. You may ask her that as an impeaching question.

(Page 10.)

* * * * *

Mr. Goldstein: Your Honor rules I cannot proceed further?

Court: That is as far as you may go.

Mr. Goldstein: May I take an exception?

(Page 11.)

* * * * *

We feel confident that no legal authority can be submitted by the Government, that will justify the court in restricting our right to impeach a hostile witness, upon a most material inquiry, to-wit, whether she had not testified on a previous occasion, that in accordance with their general instructions, from the Sheriff, not only was liquor used by them in investigating these roadhouses, but that liquor was actually given to the taxi driver, just exactly as was testified to by the taxi driver, Underwood, in this case. Had the court permitted, it might have been interesting to learn where Gates procured his liquor, which he possessed, transported, and shared with taxi drivers, in violation of the law.

Attention is also called to the testimony of Miss Johnson, who stated that she was employed to accompany Gates and Miss Meade, in the investigation of roadhouses adjacent to Portland; (Transcript, page 52) that she and Miss Meade called Mr. Gates "Father" in order to play the game, and to show that they were rounders out for a good time; she also received $50.00 from the Sheriff for her services in investigating the different roadhouses. (Transcript 55.)

Summarizing this testimony, we must conclude that Gates, Miss Meade and Miss Johnson, were employed by the Sheriff to investigate eight roadhouses in and about the city. Their investigation was completed in the course of two or three successive days. Miss Meade and Miss Johnson were each paid $50.00 for their services, and the party were reimbursed for their expenses, most of which, according to their testimony, was utilized in imbibing intoxicating drinks, dining on delectable viands, and paying taxi fares. The plan of operation, according to Miss Meade's testimony, was general in its scope, and applied to all the roadhouses investigated, as note her testimony, which was elicited by the court itself. (Sup. Trans. page 4.)

In the face of this testimony, coupled with the testimony of the taxi driver, that Gates and his party had liquor with them enroute to the Plantation Inn; that Gates brought some of it on the premises, and in the face of Merrill's denial that he sold any liquor to these informers, we contend that we had an absolute right to cross-examine Gates and his partners, upon the fact that in the course of their investigations they had actually introduced liquor to an alleged roadhouse, drank same thereat, and that they thereupon caused the arrest of the proprietor, based upon the very liquor which they themselves introduced and drank. The jury was entitled to know what reliability and credit should be

given to the testimony of Gates and his associates, at it was entirely upon their testimony that the verdict of guilty could be sustained, if at all. With our examination of the principal actors thus restricted, we were prevented from showing,

(1) What the general plan of operation was in the course of these investigations.

(2) If the plan contemplated the use of intoxicating liquor, and the transportation of same to the place marked for investigation.

(3) If the informers actually did introduce liquor into any of these so-called roadhouses and base their prosecution thereon.

(4) That the testimony they gave at this trial was inconsistent with that given on other occasions.

(5) That if they had actually introduced liquor to other places, in the course of these investigations, and pursuant to instructions, then how could they reconcile their actions on these occasions with their present denial of the use of liquor in investigating the premises of this defendant?

Under the foregoing circumstances, we earnestly contend that the court erred in thus impairing a most valuable right of defendant, to fully cross-examine a material witness on the very subject of his testimony, to-wit, the plan of operation used in making these investigations; that had the defendant been permitted to exercise this right, the testimony thereby elicited would have corroborated the testi-

mony of the taxi driver and Merrill, that the liquor which the informers claim to have purchased, had been introduced by the informers themselves and drank thereat. This would also have borne out our theory of entrapment so far as the charges of possession and of maintaining a nuisance were concerned, as well as justify the jury to infer that the conduct and actions of these informers in investigating one roadhouse, had been followed in this particular, of which fact positive proof has been submitted by the defendant.

We submit the following authorities in support of our position, that we were prejudiced by the action of the trial court in interfering with our right of cross-examination.

> "Witnesses who have been hired by the party for whom they testify to procure evidence to work up the case, are interested, and their testimony should be carefully scrutinized."
>
> 40 Cyc. 2655.

> "It is proper cross-examination to interrogate a witness as to conduct on his part inconsistent with what would be natural or probable if his statements on his direct examination were true."
>
> 40 Cyc. 2485.

> "A witness who has testified to certain facts, circumstances and occurrences, may be interrogated on cross-examination as to other similar facts, circumstances or occurrences,

where such a line of examination tends to elucidate his testimony."

40 Cyc. 2486.

"A witness who, on his direct examination has testified as to a part of a transaction, may be required on cross-examination to give the whole."

40 Cyc. 2491.

"A witness may be discredited by showing that he has been guilty of fraud in connection with the subject matter of his testimony, and a party who takes the stand may be discredited by showing that he acted dishonestly in a transaction similar to that involved in the suit."

40 Cyc. 2581.

In the case of *Lewis vs. Boston Gas Light Co.*, 165 Mass. 411 43 N. E. 178, it was held:

"That a witness who stated that he laid gas pipes in a certain street in a proper manner, may be cross-examined as to how he laid the pipes in another street."

In *Di Salvo vs. U. S.*, 2 Fed. (2nd. Ed.) 222, the court said:

"Where one of the defenses was entrapment, questions asked in cross-examination of a Government witness, who was one of the parties to an alleged entrapment, as to what transpired between them prior thereto were competent and their exclusion was error."

In the case of *Gallaghan vs. U. S.*, 299 Fed. 172,

the defendant was prevented from fully cross-examining several of the Government's witnesses. The record in that case is not unlike that at issue, and it was held that the action of the trial court in denying counsel the right to cross-examination, was a clear denial of defendant's legal rights.

The court in its opinion, cited with approval, the following:

> "Cross-examination is the right of a party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, rumor from truth, opinion from fact, and inference from recollection, and of testing the intelligence, memory, impartiality, truthfulness and integrity of a witness."

In the case of *York vs. U. S.*, 299 Fed. 778, it was contended that the trial court had made frequent interruptions in the cross-examination of the Government witness, and prevented his full cross-examination. The Appellate Court held,

> "Whatever may be the opinion of the Judge as to the credibility of the witness, he should permit full cross-examination of the witness without unnecessary interference."

In the case of *Jianole vs. U. S.*, 299 Fed. 499, error was ascribed to certain remarks and rulings made by the court in refusing to allow a full cross-examination of certain Government witnesses that

would test their credibility and knowledge of matters they testified to. The Appellate Court held that such remarks and rulings were highly improper, tended to prejudice the jury and prevented the fair and impartial trial that defendant was entitled to.

In the case of *Herd vs. U. S.*, 255 Fed. 829, the court, after declaring the rule that a full cross-examination is an absolute right, and not a mere privilege, said:

> "It was proper, relevant and material cross-examination, to draw further from the witness the fact that when the transaction was recent, and his recollection was fresh, that he told a different story, one so inconsistent with that to which he testified, that both stories could not be true. That was material cross-examination because it at once challenged the credibility of his testimony, and the more in detail his first story was, the more incredible it rendered his evidence. The cross-examiner has a right to prove, by his adversary's witness, if he can, what inconsistent statement he has made. Not only in general but in every material detail, for the more specific the contradictory statements were, the less credible is the testimony of the witness.

In the case of *State vs. Mah Jim*, 13 Ore. 235, it is said:

> "Great latitude should be allowed on cross-

examination, especially where the witness belongs to a class whose testimony general experience proves to be unreliable. Counsel should be allowed to pursue their own course in eliciting testimony, so long as they keep within reasonable bounds, and testimony that has any possible bearing upon the defendant's case should not be excluded."

"Matters not connected with the direct examination of the witness may be inquired into for the purpose of testing the accuracy, veracity and credibility of a witness."

To like effect are the following cases:

Maxwell vs. Bolles, 28 Ore. 1.
State vs. Ellsworth, 30 Ore. 150.
State vs. Savage, 36 Ore. 209.
Smitson vs. S. P. Co., 37 Ore. 88.
Goldstein vs. Mutual Pac. Ins. Co., 74 Ore. 249.

Oregon Pottery Co. vs. Kern, 30 Ore. 328.

XII.

Error in Restricting Cross-Examination of Martha Randall. (Assignments 25 and 26.)

In the Government's case in chief, Miss Martha Randall, the Superintendent of the Women's Protective Division of the Police Bureau, testified that she had secured the services of Miss Meade and Mrs. Johnson, to assist the Sheriff in these liquor investigations. It was developed on cross-examination that notwithstanding, to the best of her knowledge,

neither of these ladies drank liquor, the thought never occurred to her that they might be called upon to drink liquor and feign intoxication. On re-direct examination, the following proceedings took place:

> Q. Now, Miss Randall, you may state whether or not you knew Mrs. Johnson and Miss Meade to be reliable, responsible girls at the time that you recommended them for that mission?
>
> A. I knew them to be reliable, respectable women.

To the admission of which defendant was allowed an exception.

And thereafter the following proceedings were had:

> Now, with respect to the possibility of their having to drink out there—
>
> Court: I don't think you need go into that.
>
> Mr. Stearns: Well, perhaps not. It was brought out by counsel.
>
> Court: I know it was brought out, but it is wholly immaterial.
>
> Mr. Stearns: That is true, your Honor. It is.
>
> Mr. Goldstein: I take an exception to your Honor's remarks about that.
>
> Court: Well, I want to put an end to this.
>
> (Transcript, pages 117 and 118.)

It seems a rather strange and inconsistent rule,

that would permit the Government to bring out the information, through this witness, that Miss Meade and Mrs. Johnson were reliable and respectable women, yet would justify the court in holding, that the defendant's cross-examination of the witness upon the subject of her knowledge that they might be called upon to drink liquor and feign intoxication, was immaterial. Clearly, the defendant sought to test the credibility of this witness, yet not only were his efforts frustrated in that regard, but the court injected his opinion on the subject of the materiality of the cross-examination, which could not help but influence the jury to the defendant's prejudice.

XIII.

Error in Restricting Cross-Examination of P. V. Rexford. (Assignment 29.)

P. V. Rexford, a Deputy Sheriff, and Government witness, was one of the party that raided defendant's premises on May 15th under search warrant, and he testified to the finding of some ten bottles of liquor under the steps leading from the second story of the house to the veranda. He had testified that the Plantation Inn was not the only place searched that day, that he had been to another place and that other places were discussed after they got to the defendant's premises. On cross-examination the following proceedings were had:

Q. You said you had been to a number of

places on May 15th? Where were you?

Objected to.

Court: Objection sustained.

To which ruling the defendant excepted.

(Transcript page 120.)

The evident purpose of this line of inquiry was to ascertain if this search was part of an organized search of other roadhouses, with a view of confirming the opinion that the same general instructions, as to investigations, were followed in the raids, that were subsequently made. While this, in itself, might be considered a trifling error, yet it merely presents an additional illustration of the restriction the court placed upon our examination of the Government's witnesses, and indicates the difficulty under which the defendant labored in exercising his right of cross-examination.

XIV.

Error in Restricting Cross-Examination of T. M. Hurlburt. (Assignments 38 and 39.)

T. M. Hurlburt, the Sheriff, and a Government witness, testified that he had arranged with Gates to investigate the roadhouses in Multnomah County, Oregon, to determine whether the liquor laws were being violated. On cross-examination an effort was made to ascertain the scope of Gates' employment, and who paid his expenses. The following proceedings will indicate more clearly the nature of this objection.

Q. Who paid his expenses, Mr. Hurlburt?

Mr. Stearns: Now, if your Honor please, this is really not cross-examination.

Mr. Goldstein: This is for the purpose of impeachment, purpose of credibility. I want to know what arrangement he had with Mr. Gates. Mr. Stearns asked him whether he had made arrangements with Mr. Gates on May 10th for the purpose of raiding roadhouses. He also asked him how long he had known Mr. Gates. I am at this time attempting to ascertain from Mr. Hurlburt whether Mr. Gates had been in his employ prior to that time, what he had been employed for, and what arrangements he made with him on May 10th. That he went into on direct examination to determine the extent of his employment of Mr. Gates, if he was employed.

Court: That is the very question the court has tried to keep out of this case from the very beginning. It will not be opened up now.

Mr. Goldstein: *May I ask who paid his expenses; who paid the expenses of Mr. Gates?*

Court: That is immaterial. It is not cross-examination. (Transcript, 122-123.)

Later, in examination, it developed that a few days after these raids, Gates severed his connections with the Government as a prohibition agent, and was employed by the Sheriff as a Deputy Sheriff, whereupon the following proceedings were had:

Q. Is it not a fact you employed him for the purpose of using him as a witness in these roadhouse cases?

Objected to.

Court: The objection to that will be sustained. That is not cross-examination.

Mr. Goldstein: May I ask how long his employment is to continue?

Mr. Stearns: If your Honor please, it doesn't matter.

Court: I will not permit you to pursue that.

Mr. Goldstein: May I have an exception? I think I have made it clear that I am endeavoring to ascertain certain information about the nature of his employment.

Court: Well, you will not be permitted to ask that. He has a right to employ this man. He is not required to give his reasons for it, either.

Mr. Stearns: If your Honor please, if it was counsel's intention to imply by that question that Mr. Gates is held, or is employed by Mr. Hurlburt simply in order that he may act as a witness here, and that he is to be dismissed immediately after this trial, I am going to withdraw my objection to that last question.

Court: The court will not hear that. It is not testimony in this case.

Mr. Goldstein: If counsel desires to withdraw his objection, I may ask him impeaching questions.

Court: Not with the consent of the court.

Mr. Goldstein: I have a certain question to ask him as to certain facts.

Court: Matter material to this case?

Mr. Goldstein: Your Honor has held it was

not material, but he has withdrawn his objection.

Court: The court will not permit that to be gone into.

(Transcript 124, 125.)

The above is sufficiently explanatory of our contention that throughout the trial, defendant's right to cross-examination was prevented and impaired by the court, to the defendant's prejudice.

XV.

Error in Refusing to Permit E. W. Aylsworth to Explain His Testimony as to General Reputation of Plantation Inn. (Assignment 36.)

The Government having been permitted, in its case in chief, to prove the reputation of the defendant's establishment as a place where intoxicating liquor was being kept or sold, the defendant called as his witness one E. W. Aylsworth, for the purpose of proving that the place bore no such reputation among the neighbors residing in that community, who were in a position to know that reputation, uninfluenced by newspaper accounts and prejudiced reports.

Mr. Aylsworth having testified that he was married, and for three years lived across the road from the Twelve Mile House, was first asked if he knew its reputation, and he said, "Yes," and when asked

whether it was good or bad, made the following answer:

> "I have heard that it was bad; and then I have heard that neighbors say right adjoining that they think most of this trouble he is into is mostly bunk; that they don't believe it; they don't believe he had it. I have heard that."

(Transcript, p. 150.)

When an effort was made to explain to the witness that it was the reputation among the neighbors in that community that was being inquired into, the following procedings were had, indicating the attitude of the court in refusing to permit the witness to explain, or qualify his answer, as he certainly was entitled to do. In the face of the fact that his answer was plainly ambiguous, and clearly called for explanation, the court in justice to the defendant, should have granted it.

> Mr. Goldstein: I think the witness ought to understand that it is the reputation among the neighbors in that comunity.
>
> Court: Well, those whom he associated with.
>
> Mr. Goldstein: Yes.
>
> Q. What would you say as to that reputation? Is that good or bad?
>
> Court: Is that good or bad?
>
> A. Those who are—
>
> Court: Just answer the question now.
>
> A. Could I answer the question?
>
> Court: Would you say that is good or bad?

A. I have heard lots of bad things about the place.

Court: What?

A. I have heard it bad.

Q. I will ask you what you have heard as to the reputation of that place, as to whether it is good or bad?

Court: That has already been explained to him.

Mr. Goldstein: I believe I am entitled to have the witness explain that answer, if it is susceptible of explanation.

Court: I think it should stop where the witness puts it by his answer Yes or No.

Q. Well, can you answer what you have stated?

Mr. Stearns: I think that has been ruled on.

Court: Yes, I think the witness has answered the question.

Q. Mr. Aylsworth, probably you misunderstand the question. You have heard the reputation of the place discussed by the neighbors, have you?

A. Yes.

Q. And you have also heard it discussed by people, outsiders, who are not neighbors?

A. Yes.

Q. Now, by the neighbors who are in position to know, have you heard it discussed among them?

A. Yes.

Mr. Stearns: Just a minute.

Court: You have to take the whole thing together, and ask him whether it is good or bad.

Mr. Stearns: He has already done that, your Honor; and, if the court please, certainly he would be bound by the answer of his own witness.

Mr. Goldstein: Oh, I don't know as that is such a rule. I have a right to have the witness explain the answer.

Court: Well, you know that rule as well as anybody in the courtroom.

Mr. Goldstein: About what rule?

Court: About impeachment on reputation.

Mr. Goldstein: I understand the rule perfectly.

Court: You know the practice as well as any man in the courtroom.

Mr. Goldstein: I understand, but where a witness does not understand, I think he has a right to explain.

Q. Now, Mr. Aylsworth—

Court: I think you have to stop now. I will not permit any further inquiry.

Mr. Goldstein: May I have any exception?

Court: Yes, you may have your exception.

Mr. Goldstein: May I state what I would expect the witness to state—not in the hearing of the jury? I want the record to show.

Court: Whatever you state, you may state outside. This jury is an intelligent jury. And state it short.

Mr. Goldstein: This witness will testify that, among the neighbors who know, who are in a position to know, the reputation of that place is very good. But the reputation among those who are not in a position to know, who

base their information upon newspaper account and prejudiced reports, it is not good; and that is what he would explain if permitted to answer; and that he has been himself in the place many times.

Court: You know that is not proper.

Mr. Goldstein: As preliminary?

Court: What he ascertains by being in the place. That is not character testimony.

Mr. Goldstein: As preliminary to that question, I was going to ask him—

Court: As preliminary or in any other sense.

Mr. Goldstein: May I have an exception to your Honor's ruling?

Court: You may have an exception.

(Transcript p. 151-154.)

No citation of authority is necessary to justify the exception taken to the court's attitude toward this examination of defendant's witness, whereby he was prevented from making an explanation, which was warranted by an apparent misapprehension of the nature of the testimony sought to be elicited.

XVI.

Error in Refusing to Admit Evidence of the General Reputation of A. B. Gates for Truth and Veracity. (Assignment 32.)

Gates, the informant, who was responsible for this prosecution, was of course, the principal wit-

ness against the defendant. The credibility given by the jury to his testimony was an important factor in arriving at its verdict. The defendant sought to discredit Gates, by proving that his reputation for truth and veracity was bad, and for that purpose he called as a witness in his behalf one C. E. Carroll, the Sheriff of Jackson County, Oregon, who had held that office for a period of five years. He testified that he knew Gates, had become acquainted with him at Medford, Jackson County, some two or three years ago, and that he knew his reputation in that community for truth and veracity. (Transcript page 141-146.) The efforts of defendant's counsel, to ask the usual preliminary questions of the witness, as to what Gates was doing in that community at that time, were frustrated by the court. The following excerpt is illustrative:

> Court: What is it you want to ask?
>
> Mr. Goldstein: I am going to ask him if he knows the reputation of this man Gates for veracity in Medford, where he had been residing and working as a state Prohibition Agent, working under the county, Jackson County.
>
> Court: Do you know his reputation in Jackson County?
>
> A. I do.
>
> Court: For truth and veracity?
>
> A. I do.
>
> Court: Get to the question, then.
>
> Mr. Goldstein: I thought I could ask a pre-

liminary question or two as to what Gates was doing at that time, if he knows.

Court: I don't think you can ask that question.

Mr. Goldstein: May I have an exception to your Honor's ruling?

Court: You may have your exception.

(Transcript p. 146-147.)

To the writer's knowledge, he knows of no other instance, where the court so drastically closed, to counsel, a preliminary inquiry of this nature. It seemed then, as it does now, that the court erred in refusing to permit us to develop, by this witness, a most important matter, particularly in view of the court's subsequent action, and that is, what was the occupation of Gates in Medford, and was it such that he could have readily acquired a reputation for veracity, within the time of his residence thereat. This, the court would not allow us to establish.

Then, when it was ascertained that Gates had been in Medford about two years ago, the following proceedings were had:

Court: How long was Mr. Gates down there?

A. He was there about three months, I should judge, making an off-hand guess.

Court: Three months?

A. Yes.

Court: Long enough to form a reputation.

A. He certainly did form one.

Court: That is two years ago?

A. I think it was two years ago about last August he came.

Court: He was there temporarily?

A. Yes.

Court: What is it you want to ask?

Q. You may state what was his reputation, whether it was good or bad.

A. It was bad.

Court: Just a moment. I am in doubt whether that should be proceeded with. He was only there temporarily, for a short time.

Mr. Goldstein: I was asking Mr. Gates, if your Honor will recall, what he had been doing for the last four or five years, and most of his time he spent, not in Portland, but in going from place to place. He might have maintained a residence here, but his operations and place of business were in Medford, he testified to, and Salem, and Astoria, and Heppner; and if he stayed in Medford three months, sufficiently long to permit of reputation being established as to his truth and veracity.

Court: I think the rule is that it must be confined to the community in which he resides, and I shall so hold in this case.

Mr. Goldstein: I will take an exception to your Honor's ruling.

Court: You may have your exception. That may be stricken out.

Mr. Stearns: I ask that it be stricken out and the jury instructed to disregard it.

Court: Yes, that may be stricken out, and the jury are instructed to disregard it.

(Transcript, p. 148.)

We contend that the court erred in striking from the record the evidence of Sheriff Carroll, that the reputation of Gates for truth and veracity was bad. The reason for his decision was based upon the fact that Gates had been in Medford only temporarily, and that Portland, and not Medford, was his place of residence. The evidence already showed that Gates had been a detective for thirty years, and that for two years, prior to his connection with the prohibition office, he had been employed by the Anti-Saloon League as an operative in various cities in the State of Oregon. (Transcript, page 59.) It is therefore quite evident that he never stayed in Portland long enough to become known and to acquire a reputation in that city. This was made apparent by the fact that he was able to pose, in Portland, as a cattle-man from Eastern Oregon. While Gates might have made Portland his legal residence, yet it is likewise true that his home was where he was employed, and Sheriff Carroll had testified that he had been in Medford long enough to have acquired a reputation thereat. The following will demonstrate:

> Court: Long enough to form a reputation?
> A. He certainly did form one.
> (Transcript, page 148.)

As stated in 40 Cyc. 2600:

> If a witness has acquired a reputation in a place where he has resided, such a reputation may be shown, although the witness resides there but a short time.

In *Underwood on Criminal Evidence,* page 538, it is said:

> "Evidence of good or bad reputation, existing two or three years prior to the trial, is admissible. It cannot reasonably be presumed that a man of mature age and settled habits would acquire a new reputation in that comparatively short time."

Under note 67 of this text, a number of decisions are cited in support thereof, of which we have selected the following that appear to be the leading cases on the subject:

In the case of *State vs. Cushenberry,* 157 Mo. 168, the court said:

> "This man was a nomad of such malodorous reputation that soon after his arrival in Chillicothe he was pointed out as a 'house breaker.' If the reputation of such a one could not be impeached in the locality where last he lingered, the result would be he could not be impeached at all; and so he would be allowed to testify from the same high plane as the most reputable citizen. Such a doctrine would be intolerable, and often defeat the ends of justice. We do not subscribe to it."

In the case of *Brown vs. Perez,* 89 Tex. 282, at page 289, the court said:

> "Upon authority and sound principles, we think it may safely be said that where the evi-

dence of a witness is such that it fairly raises the issue of his veracity, or where the testimony of other witnesses relating to his character at or near the time of the trial tends to impeach his character for truth and veracity, or in case the person whose character is in issue has removed beyond the jurisdiction of the court, or has been transient, so that he has no fixed and known residence for a time sufficient to make a reputation for truthfulness, resort may be had to evidence of the reputation of such witness at the place of his former residence and at a time remote from the time of trial. No definite rule can be stated which will apply to all cases. Circumstances other than those stated might exist which would render it impracticable to make proof of the reputation of the witness at or near the time of trial or at the place of his residence at that time, and would authorize resort to this kind of evidence."

In *Re Brown,* 143 Iowa 649, the court said:

"From the evidence in this case, it is clear that the witness had acquired a reputation in Lone Tree (a place of temporary residence). * * * In this case, the removal of the witness was into a large city, where his character might be hidden in obscurity for years, without resulting in a general reputation, either for good or bad."

In *Brotherhood vs. Vickers,* 121 Va. 311, the court said:

"The residence or community of a brakeman for the purpose of character testimony, extends

as far as he is well known and people are acquainted with him and his character, and is therefore coextensive with the line over which he works."

XVII.

Error in the Instructions Given, and Refusal to Give Requested Instructions. (Assignments 40 to 50 inclusive.)

(A) It is contended that the court erred in giving the following instruction, to which exception was duly taken:

> "Now, the question involved in this case is a question of fact: Do you believe from the testimony beyond a reasonable doubt, that, at the time or about the time stated in the information, the defendant Merrill had possession of intoxicating liquor? If so, and you do so believe, then you should find him guilty as charged in the first count of the information."

(Assignment 40.)

The defendant also requested that this instruction be modified, by adding that the "posession" of liquor as defined by the act, must be "possession" with intent to sell, and to the refusal of the court to modify such instruction, an exception was also taken. (Transcript, page 173.)

The 18th amendment to the constitution does not make personal use of intoxicating liquor unlawful;

sale, manufacture and transportation are the things prohibited, and while it is true that section 33 of the National Prohibition Act, prescribes a rule of evidence where possession of liquor, shifts the burden of proof upon the possessor, to show that such liquor was lawfully acquired, yet the Act itself does not, under the scope of the constitutional amendment, make the mere possession, stripped of every other fact or incident, a crime. We contend that possession of liquor, in and by itself, is lawful unless it is coupled with the illegal manufacture, sale or transportation. (*U. S. vs. Dowling,* 278 Fed. 630.) (*Hilt vs. U. S.* 279 Fed. 421.) (*U. S. vs. Cleveland,* 281 Fed. 248.) (*U. S. vs. Illig,* 288 Fed. 939.) (*Street vs. Lincoln Safe Deposit Co.,* 254 U. S. 88.) All these authorities were quoted, with excerpts therefrom, under Point II of this Brief (page 9), relative to the insufficiency of count I, charging mere possession as a crime.

(B) It is further contended that the court erred in giving the following instruction, to which exception was duly taken:

> "It is also charged that at the same time he maintained a common nuisance, that is, a place where intoxicating liquor was kept, bartered and sold. Now, a single sale, without more, would not constitute a nuisance But if, however, a sale is made in a place fitted up for the transaction of business, and in the ordinary course of business, as if one should approach a

bar in the business house, ask for and obtain intoxicating liquor from the manager or person in attendance, although there was but one purchase, it would be sufficient to justify the jury in finding that it was a common nuisance, or a place where intoxicating liquors were kept, bartered and sold."

(Assignment 41.)

This is contrary to the interpretation of the Act given by the court in the case of *U. S. vs. Cohen,* 268 Fed. 420, *U. S. vs. Butler*, 278 Fed. 677, and *U. S. vs. Dowling*, 278 Fed. 643, all of which held that under section 21 of the Volstead Act, declaring a place for the unlawful sale of liquor to be a nuisance, the evidence must show that the sales therein were continuous or recurrent; that a single sale would be insufficient. These authorities were quoted, with excerpts therefrom, under Point III of this Brief (page 15) relative to the insufficiency of count III, which is the nuisance charge.

In line with these authorities, the following instruction should have been given, as specifically requested by the defendant:

"In connection with the charge against the defendant for maintaining a nuisance, where intoxicating liquor was kept or sold, I instruct you that the word "maintain" as used in the prohibition act means "continuance" and implies a certain degree of "permanence." Congress by the use of the words "kept and sold"

> in violation of the law, means either habitually or continually or recurrently so "kept" and "sold." In other words, a single act or a single sale is insufficient. I therefore instruct you that to constitute a nuisance, the prosecution must satisfy you by evidence beyond a reasonable doubt of the continuance and recurrence of acts or sales in violation of the law. If the evidence falls short of the required proof, your verdict should be for the defendant."
>
> (Assignment 45.)

This requested instruction was prepared in accordance with the interpretation of section 21 of the Volstead Act, as announced in the decisions last cited.

(C) It is further contended that the court erred in giving the following instruction, to which exception was duly taken.

> "There has been some evidence offered in the trial of this case tending to show that the establishment conducted by the defendant and known as the Twelve Mile Roadhouse, bore a common reputation as being a place where intoxicating liquor was kept and sold, and I instruct you that that is competent evidence and should be considered by you in determining whether or not the defendant is in fact guilty of maintaining a nuisance at the time and place and in the manner charged in the information."
>
> (Assignment 42.)

That the court erred in this instruction is manifest, from the authorities we submitted in support of our contention that this testimony was inadmissible (Point 4). The National Prohibition Act, which is complete in itself, makes no provision for the admission of this testimony, and in the absence of express statutory authority, the decisions are unanimous in holding, that general reputation is inadmissible to prove the charge made (33 C. J 755). If this were not the rule, it would, in many cases, be easy to convict on mere suspicion. The speech which Shakespeare attributes to Iago has become a truism, that "reputation is oft got without merit, and lost without deserving."

(D) It is further contended that the court erred in failing to instruct the jury, limiting the testimony of the Government's witness, Nickell; as to alleged sales made by the defendant prior to the time of the specific offense charged in the information, and commonly known as the "Gates episode."

Court: Are there any exceptions?

* * * * *

Mr. Goldstein: And also in the court not limiting the testimony of the waiter. I believe he overlooked instructing the jury about that. They have no right to consider that except as it might tend to corroborate, assuming that they believe the offense took place on May 10th.

Court: What is it you refer to?

Mr. Goldstein: Plaintiff brought in a waiter

—Nickell, I believe—as to something that took place in April, prior to this, and which is not the basis of this allegation or charge. May I have the record show they would not have a right to consider that unless they believe the charges alleged in the information have been established as to May 10th?

Court: I think I have made that clear.

Mr. Goldstein: May I have an exception?

Court: Yes. (Pages 172-173.)

Nowhere in the instructions does the court refer to the testimony of Nickell, and the court's omission therein was duly called to his attention. As previously stated in Point 5 of this Brief (page 19) Nickell was called by the government in its case in chief, to testify that in April, 1923, some three weeks prior to the Gates episode on May 10th, which was made the basis of the information, the defendant had sold or dispensed intoxicating liquor to his patrons. Objection to this testimony as immaterial and outside the scope of the case, was duly made. (Transcript, pages 48-50.) The purpose of this testimony was undoubtedly intended to prove intent and knowledge on the part of the defendant, only so far as the charge of nuisance was concerned, and while we do not concede that the court was correct in his ruling on the admissibility of this testimony, even thus limited (as we have already shown under Point 5 of this Brief), we at least expected, that when the court instructed the jury, he would give

the usual appropriate instructions cautioning the jury to consider this testimony not as proof of the identical charge in the information, but merely for their consideration in determining whether or not the defendant maintained a nuisance, and for no other purpose.

As stated in *Saldiver vs. State*, 55 Tex. Crim. 177:

> "Even when such testimony is admissible for any purpose, its effect must be limited by the charge to the purpose for which it was admitted."

That the court erred in failing to give an instruction limiting the purpose for which particular evidence may be considered, *where such instruction was specifically requested*, is too well established to need citation. (26 R. C. L. 1033.) (*Trenton Ry. vs. Cooper*, 60 N. J. L. 219.) (*Bailey vs. State*, 65 Tex Crim. Rep.)

As summed up in the case of *Glover vs. People*, (Ill.) 68 N. E. 464:

> "The court upon the request of defendant should have limited the effect of said proof by a proper instruction."

While it is true that so far as the Federal courts are concerned, error can only be urged, when this instruction is specifically requested (*Hallowell vs.*

U. S., 253 Fed. 855.) (*Pappas vs. U. S.* 292 Fed. 982.) (*Reese vs. U. S.* 203 Fed. 824.) (*Ryan vs. U. S.,* 216 Fed. 13.), this record will show that we not only called the court's attention to his omission in this respect, but specifically requested an instruction covering this testimony. The court apparently was under the impression that he covered this subject in his general instructions, but reference to same will disclose that he failed to do so. (Transcript, pages 160-172.)

XVIII.

Error in Refusing to Instruct the Jury Upon the Defendant's Theory of His Defense. (Assignment 48.)

The theory of the defense in this case, so far as the charges of possession of liquor and maintenance of nuisance are concerned, was that the witness Gates, and his two female associates, went upon the premises in question with their own liquor, and that whatever liquor was possessed in the place or drank thereat, was the liquor introduced therein by these people, and that this was done for the specific purpose of using this liquor as a means of entrapment. Evidence to that effect was testified to by Mr. Underwood, the chauffeur, and Mr. Merrill, the defendant.

At the close of the case, and before the court instructed the jury, the defendant submitted in writing the following requested instructions:

"The evidence in this case tends to show that Mr. Gates and his associates went upon the premises in question with their own liquor and it is contended by the defendant that they did so with the specific purpose of using their own liquor as a means of entrapping the defendant, in committing a violation of the law. I instruct you that the first duty of officers of the law is to prevent and not to punish crime and it is not their duty to incite or create crime for the sole purpose of prosecuting and punishing it. A conviction will not be sustained where the officers originate the intent and apparently join in the criminal act, first suggested by the officers merely to entrap the defendant."

(Assignment 46.)

"Therefore, if you believe that the defendant was induced by the importunity of the officers to violate the law, that is, if he did violate it, and if through their inducement, he sold the liquor or permitted them to drink the liquor on his premises, then you should return a verdict of not guilty, as it is against the policy of the United States courts to sanction a conviction in any case where the offense was committed through the instigation of public agents." (Assignment 47.)

The court refused to give these instructions, but instead, over our objection, gave the following instruction, which presented the theory of the Government, and wholly ignored the theory of the defense:

"It is also in evidence that, after these par-

ties arrived at the roadhouse, they feigned, as one of the witnesses said, intoxication; if they were not really intoxicated, they at least feigned intoxication. Now, if they did that, and the sale was made as claimed by the Government, it would be no defense in this case. One cannot be induced and persuaded by a Government officer to commit a crime, and then be prosecuted, but a Government officer may lawfully afford an opportunity for the commission of an offense, and the testimony of the Government in this case tends to show that that is all these Government witnesses did. They went out to this roadhouse; they, as one of them said, attempted to create an atmosphere that would make it possible for them to buy liquor at that place. You may not approve of that method. It may not be the best method. I don't know. But it would be no excuse or defense for the violation of the law. It may go to the credibility of the witnesses, but if you believe that the sale was made as claimed, then it would be a violation of the statute." (Assignment 44.)

We earnestly contend that the court erred in refusing to present our theory of the case, and in this connection submit the following authorities:

"A defendant in a criminal case, is entitled to have the court clearly state to the jury each distinct and important theory of defendant, so that the jury may understand what they are, and the essential rules of law applicable thereto.

Zoline on Criminal Law, page 368.
Hendry vs. U. S., 233 Fed. 18.

In the case of *Calderon vs. U. S.*, 279 Fed. 556, the defendants were charged with a conspiracy to sell morphine. They were convicted on the testimony of a narcotic inspector, who pretended to be an adict. The narcotics were found in the seat of a buggy, which the defendants used to transport them to the hotel, which was the place of their arrest. It was the contention of the defendants that the buggy belonged to the officer, and that he had put the narcotics there for the purpose of making a case against them. The court was requested to charge the jury that if they believed defendant's contention, they should return a verdict of not guilty. The failure of the court so to do resulted (page 63) in the reversal. The Appellate Court, in its opinion, said:

> "Where the evidence presented a theory of defense and the court's attention is particularly directed to it, it is reversable error to refuse to give any charge on such theory."

In Byrne on Federal Criminal Procedure, page 183, citing *Allison vs. U. S.*, 160 U. S. 203, it is stated:

> "Likewise error is committed when the charge mentions and is founded on evidence on one side and disregards evidence in contradiction of the same point."

In *Bird vs. U. S.*, 180 U. S. 356, 361, the defendant in a murder case testified that he killed in self defense. The court failed to instruct in

terms that if defendant believed and had reason to believe that the killing was necessary for the defense of his life or to prevent the infliction of great bodily harm, then the verdict should be not guilty. The instruction given was negative in form. The opinion states:

> "It is well settled that the defendant has a right to a full statement of the law from the court and that a neglect to give that full statement when the jury subsequently falls into error, is sufficient reason for reversal."

In the case of *State vs. Brody* (Iowa), 91 N. W. 801, the court said:

> "We think, too, the defendant was entitled to have his theory of the possession of the goods specifically called to the attention of the jury with instructions that if such claim was found to be true or to raise a reasonable doubt in the minds of the jurors, he was entitled to an acquittal."

In the case of *Powers vs. Commonwealth,* 110 Ky. 386, 53 L. R. A. 245, the court failed to submit to the jury the view of defendant that the conspiracy charge was a combination which had for its purpose alarm only, and not as charged by the state "to alarm, excite terror and inflict bodily harm." The court said:

> "Whether the evidence was to be believed or not, was a question solely for the jury, under

proper instructions. The accused had the right to have the jury pass upon the question whether that was the sole object of the assemblage, and upon the further question whether the killing of Goebel necessarily or probably would result from such an assemblage. It will not do to say that because the judges would have disregarded such evidence, had they been jurors at the trial, that it is not prejudicial, for the jurors are the sole judges of the weight of the evidence, and to hold otherwise would be for the court to assume to perform those functions which from time immemorial have been regarded as within the sacred province of the jury."

In *Banks vs. State,* 89 Ga. 75, the court said:

"Where, on a trial for murder, the court in its charge, grouped together and stated hypothetically the alleged facts constituting the State's theory of the homicide, it would be the duty of the court if the evidence so authorized, to likewise group and state the alleged facts constituting the defendant's theory."

In *Trask vs. People,* 104 Ill. 569, the court said:

"On the trial of a party for a conspiracy to obtain goods, etc., where the evidence upon the material points in the case is conflicting, it is error to refuse an instruction for the defendant fairly presenting the law on the theory of the case contended for by him, having a basis in the evidence on which to rest."

Further, the court in this instruction, in effect, told the jury that there was no evidence of entrapment. In this the court was plainly in error.

In the very recent case of *De Salvo vs. U. S.*, 2 Fed. (2nd edition), 222, the court said:

> "It was error to refuse to give an instruction of Entrapment as required by defendant, and it was error to instruct the jury that there was no evidence of entrapment."

We further contend that in view of all the surrounding circumstances in this case, that the court should have given the instruction on Entrapment as requested, which was formulated in accordance with the rule frequently cited with approval in the following cases:

Sam Yick vs. U. S., 240 Fed. 60.
Woo Wai vs. U. S., 223 Fed. 412.
Petersen vs. U. S., 255 Fed. 235.
Butts vs. U. S., 273 Fed. 35.
U. S. vs. Eccoles, 253 Fed. 862.
U. S. vs. Eman Mfg. Co., 271 Fed. 352.

This rule is aptly summed up in the recent case of *Newman vs. U. S.* 299 Fed. 128, as follows:

> "The first duty of an officer of the law is to prevent and not to punish crime, and when a criminal offense originates, not with the accused but is conceived in the mind of the Government officer, and the accused is, by persuasion, deception or inducement, lured into the commission of a criminal act, the Government is estopped from prosecution thereof."

CONCLUSION

We bespeak the court's indulgence for the length involved has made it necessary. In our endeavor of this brief, but the importance of the questions to shorten the brief we realize that we have, through our failure to discuss same, in effect, waived a number of assignments that we had filed. This omission is not due to any concession of their lack of merit, but simply for the sake of brevity, and because of our confidence that enough error has already been demonstrated to warrant the reversal of this case.

Whether this 66 year old defendant merits the humiliation and degradation of a jail sentence, in the declining years of his life, is, of course, not a material inquiry, so far as the exact rigor of law is concerned, but the same rigor of the law requires that the verdict should have at least been obtained only after all the legal rights of the defendant had been just as zealously safe-guarded and protected as were the rights of the Government. We hold no brief in support of the agitation that has been aroused over the evils incident to the enforcement of the prohibition law, through the testimony of informers and "stool pigeons." This may be a necessary evil, but if the prohibition law cannot be enforced except through licensing these informers to drink, possess and transport intoxicating liquor, and thereby trample upon the very law that they

themselves invoke and have sworn to uphold, then the prohibition law is doomed to fail, and should fail! Whatever may be our views on this subject, we at least agree upon the fundamental principle that the law in its mercy, exacts no conviction through the diminution of any of the strict and obvious safe-guards that the law confers upon the accused.

With all due respect to the trial court, for whom we entertain the kindliest feelings, we are compelled to state that he unconsciously permitted the denial of those legal rights that every defendant expects will be zealously protected in a United States court.

Respectfully submitted,

Barnett H. Goldstein,

E. M. Morton,

Attorneys for Defendant.

No. 4503.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED T. MERRILL,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

GEORGE NEUNER,
United States Attorney for the District of Oregon.

J. O. STEARNS, Jr.
Assistant United States Attorney for the District of Oregon.
Attorneys for Defendant in Error.

GEO. I SMITH PRINTING CO. PORTLAND, OREGON 5-7-25 40

FILED
MAY 11 1925

No. 4503.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED T. MERRILL,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

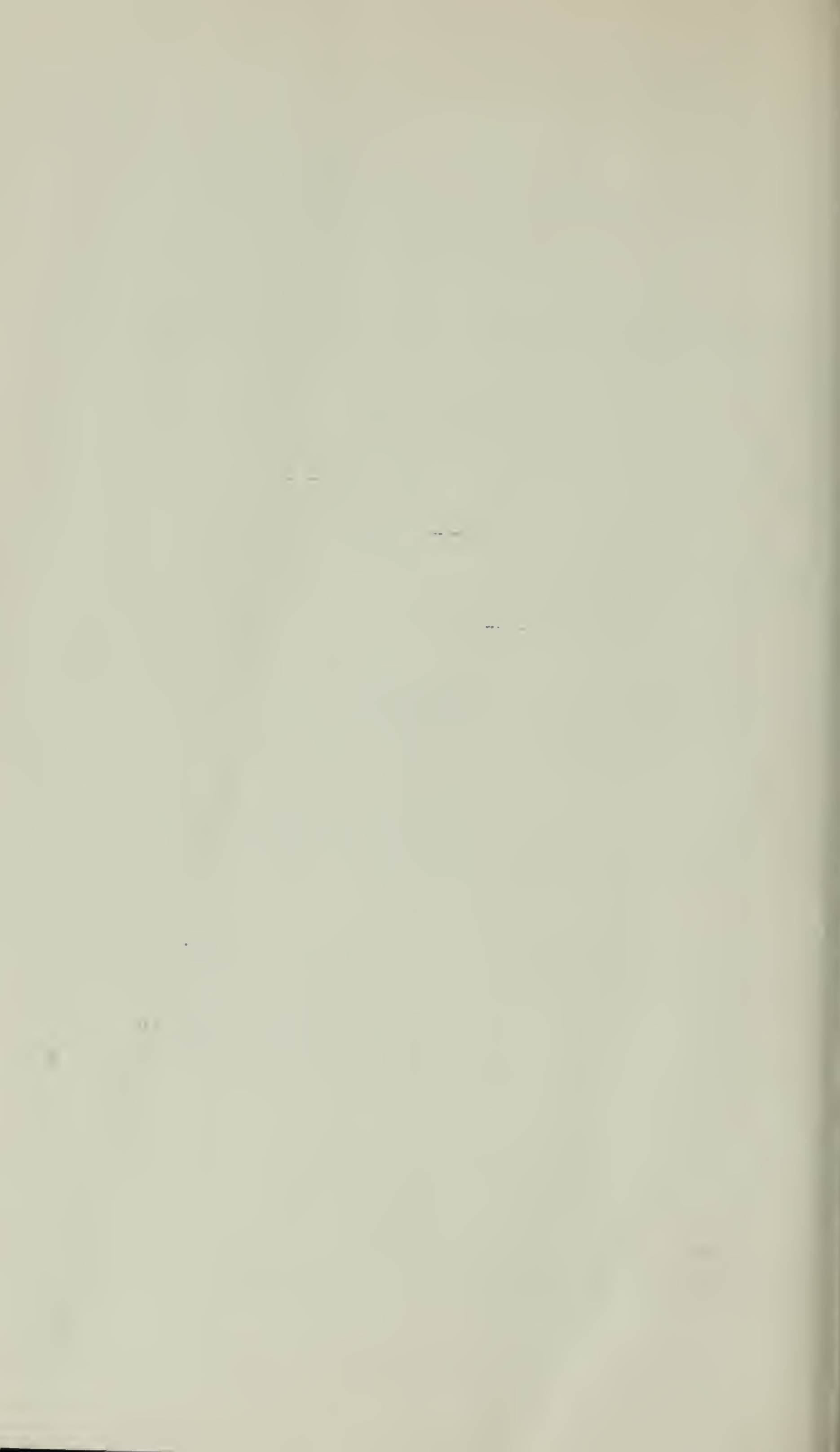
Brief of Defendant in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

GEORGE NEUNER,
United States Attorney for the District of Oregon.

J. O. STEARNS, Jr.
Assistant United States Attorney for the District of Oregon.
Attorneys for Defendant in Error.

GEO. I SMITH PRINTING CO. PORTLAND, OREGON 5-7-25 40



STATEMENT OF FACTS.

It seems essential that the facts in this case should be fairly and fully presented, particularly so as many of the errors claimed are predicated on what we believe to be a distortion of the proofs adduced upon trial.

In the Spring of 1923, conditions in the roadhouses adjacent to Portland were so notoriously bad that T. M. Hurlburt, Sheriff of Multnomah County, felt impelled to join forces with the Federal Government in order that the liquor law violations and evils growing out of the same in such houses might be curbed and the proprietors of the resorts brought to justice.

The Twelve Mile Roadhouse, or Plantation Inn, of which Fred T. Merrill, plaintiff in error, was (and still is, for that matter) proprietor, claimed the doubtful distinction of being the most flagrant offender of its sort against the prohibition laws.

Accordingly, one A. B. Gates, for thirty years a resident of Portland and at that time a Federal Prohibition Agent, joined forces with the Sheriff for the purpose of investigating Multnomah County roadhouses. It was considered desirable to have the

testimony of disinterested witnesses in addition to that of the investigating officers; and, accordingly, Mrs. Martha Randall, head of the Women's Protective Division of Portland, was consulted and, upon her recommendation, Miss Ruth Meade, an organist of this city, and Mrs. Violet Johnson, now in charge of the Women's Protective Division at Bend, Oregon, were induced to accompany Mr. Gates. Both Miss Meade and Mrs. Johnson had for some time been volunteer social workers, and they were chosen for the mission on a basis of character and intelligence. It was realized at the outset that any prosecution which might follow investigation of these roadhouses—particularly of the Merrill institution—would be bitterly contested.

The Plantation Inn, or Twelve Mile Roadhouse, was the first one visited during the course of these investigations and is the only one with which we are concerned.... We wish to make that fact clear at the outset because during the trial of the Merrill case, the defense persistently attempted to confuse the issues by adducing testimony, on cross examination, as to the subsequent investigations of other roadhouses—some seven or eight in number.

At this point, also, may we emphasize the fact

that in accepting the mission required of them, Miss Meade and Mrs. Johnson volunteered their services without hope or expectation of pecuniary reward, as will appear from a reading of the testimony in the record, and the $50.00 each which was subsequently paid to them by the Sheriff was a gratuity pure and simple.

On the evening of May 10, 1923, Gates, accompanied by the two ladies, left Portland in a taxicab for Merrill's place, and arrived there at about 11:30 P. M. They remained at the house until about three o'clock the following morning. Contrary to the contention of the plaintiff in error and quite in accord with the findings of the jury, they had no liquor with them when they went out to the Plantation Inn. Almost immediately upon arriving at the Merrill roadhouse, they were served by the defendant himself over the bar with gin fizzes and whiskey. They were also served with several rounds of intoxicating liquor during the course of the dinner which followed. Neither Miss Meade nor Mrs. Johnson is addicted to the use of intoxicating liquor, but, in order that they might be able to testify as to what was served, they tasted of the drinks, which they then got rid of by pouring on the floor under the table and into the waste food and coffee.

A number of guests, both men and women, were in the house during the time Gates and his party were there, and dancing, singing and drinking liquor made up the night's entertainment. One man known as Smith became so intoxicated that he fell while on the dance floor and had to be assisted out of the room by a waiter. A young girl (name unknown, but said to be a theatrical performer from Spokane, Washington) was hoisted upon the bar where she sang and danced. This was in Merrill's presence. At the time of leaving, Gates and Mrs. Johnson purchased from Merrill two pint bottles of intoxicating liquor—one moonshine whiskey and the other synthetic gin—for which they paid him $5.00 each. Those bottles were in evidence at the trial.

On May 15, 1923, Deputy Sheriffs of Multnomah County, together with federal officers, armed with a search warrant and warrant of arrest for the plaintiff in error, went to Merrill's roadhouse, and, after an extended search, found in a paper sack hidden under three steps leading from the second story of the house in question onto a veranda which fronts upon the highway, approximately eleven bottles of whiskey, gin and cocktails. The bedroom

then used by Merrill is immediately adjacent to this veranda, the door from the bedroom opening into a hallway, which hallway in turn leads immediately to the veranda. The testimony indicated that the liquor and containers had been under the steps but a short time, as they were fresh and clean. As indicated above, Plantation Inn is equipped with a regulation old-fashioned bar, such as were in use in saloons and roadhouses in pre-prohibition days. Numerous empty gin and cocktail bottles of the kind and character of those found under the varanda steps were discovered back of the bar and in boxes scattered about the premises. Two cocktail bottles, one of them yet damp and smelling of the odor of the liquor it had contained, were found in Merrill's bedroom. A pint bottle, yet containing a small quantity of moonshine whiskey, was found on the back shelf of the bar.

One Nickell, employed as a waiter by Merrill shortly prior to the 10th of May, 1923, testified that while he was at the roadhouse in question he personally saw Fred T. Merrill, plaintiff in error, make several sales of intoxicating liquor, some of which was served as drinks over the bar, some of which was sold by the bottle and carried away by the purchasers.

POINTS AND AUTHORITIES.

1. Where it does not appear from the record that the defendant was arrested on the information, it is not necessary that the same shall be supported by an affidavit showing personal knowledge of facts and stating probable cause.

Morgan vs. United States, 224 Fed. 82.
United States vs. McDonald, 293 Fed. 433.
Jordan vs. United States, 299 Fed. 298.

2. It is well settled that a trial and conviction may be had on an information which is wholly without verification.

Same authorities.

3. In a prosecution for unlawful possession of intoxicating liquor under the National Prohibition Act, the burden is upon the accused to show that the liquor made the basis of the prosecution was, in fact, lawfully possessed, and an information which charges that the defendant unlawfully possessed intoxicating liquor, fit for beverage purposes, etc., sufficiently charges the offense.

Anzich vs. United States, 285 Fed. 871.
Payne vs. United States, 2 Fed. (2d) 855.
Feinberg vs. United States, 2 Fed. (2d) 955.
Linden vs. United States, 2 Fed. (2d) 817.

4. A single sale of intoxicating liquor may be sufficient to warrant a jury in returning a verdict of guilty against one charged with maintenance of a nuisance under the National Prohibition Act.

> Fassolla vs. United States, 285 Fed. 378.
> Barker vs. United States, 288 Fed. 249.
> Marshallo vs. United States, 298 Fed. 74.
> Singleton vs. United States, 290 Fed. 130.
> Stoko vs. United States, 1 Fed. (2d) 612.

5. In a prosecution for maintaining a nuisance under the National Prohibition Act, general reputation as to the character of the place where such nuisance is maintained is admissible to prove the guilt of the defendant.

> Ryan, et al, vs. United States, 285 Fed. 734.
> Anzine vs. United States, 260 Fed. 827.

6. The refusal of the trial court to permit the defense to cross examine a witness for the prosecution upon matters wholly irrelevant to the issue under inquiry and not fairly calculated to test the credibility of the witness does not constitute error.

> West vs. United States, 2 Fed. (2) Page 201.
> Wigmore on Evidence, Vol. 2 (2nd Ed.)
> Section 878.

7. Evidence of reputation to affect the credibility of a witness ordinarily and generally should be based upon what is said of the witness by the members of the community in which he lives and acts—that is to say, the place or community on which the reputation is predicated ordinarilly must be in the neighborhood where such witness has resided.

> Wigmore on Evidence, Vol. 3, Page 365, Section 1615.
>
> Williams vs. United States, 168 U. S., 382-397.

8. Where the evidence shows without conflict that the government witness did no more than offer to buy liquor, thus affording the plaintiff in error an opportunity to violate the law, there is no entrapment.

> Jordan vs. United States, 2 Fed. (2) 598.
>
> Murphy vs. United States, 2 Fed. (2) 599.
>
> Johnstone vs. United States, 1 Fed. (2) 298.

9. A conviction will not be set aside because of refusal to give instructions in the language requested by the accused's counsel to the same effect as instructions given by the Court.

> Stubbs vs. United States, 2 Fed. (2) 468.

ARGUMENT.

For the convenience of the Court, we shall take up and discuss the assignments of error relied upon in the order in which they are argued by counsel for Mr. Merrill.

1. The first assignment relied upon is that the information is not supported by affidavit showing probable cause, and is therefore insufficient.

It is a rule of law that where it does not appear from the record that the defendant was arrested on the information, it is not necessary that the same shall be supported by an affidavit showing personal knowledge of facts and stating probable cause. Indeed, in such event, it need not even be verified.

No objection was interposed to the sufficiency of the information prior to trial, and by virtue of that fact, the plaintiff in error would, in any event, have waived his right to challenge the sufficiency of the verification.

It is well settled that a trial and conviction may be had on an information which is wholly without verification.

We therefore submit that assignment of error number one is completely devoid of merit.

Morgan vs. United States, 224 Fed. 82.
United States vs. McDonald, 293 Fed. 433.
Jordan vs. United States, 299 Fed. 298.

The case last cited was decided in this Court in an opinion rendered by Judge Gilbert.

2. The second assignment questions the sufficiency of Count One, charging possession, on the ground that the same does not state facts sufficient to constitute an offense. Upon that point it is the principal contention of counsel for Merrill that mere possession of intoxicating liquor does not constitute an offense under the National Prohibition Law, and that it is incumbent upon the prosecution to negative all exceptions contained in the law relative to possession.

It is necessary only to advert briefly to recent authorities in point. In the case of Panzich vs. United States, reported in 285 Fed. 871 (9th Circuit), Judge Hunt, speaking for the Court, has stated in certain terms that in a prosecution for unlawful possession of intoxicating liquor under the National Prohibition Act, the burden is upon the accused to show that the liquor made the basis of the prosecution was, in fact, lawfully possessed.

An information which charges that the defendant unlawfully possessed intoxicating liquor, fit for beverage purposes, etc., sufficiently charges the offense.

> Pane vs. United States, 2 Fed. (2nd Ed.) 855.
>
> Feinberg vs. United States, 2 Fed. (2nd Ed.) 955, decided by District Judge Munger, is also in point and cites numerous authorities which support the sufficiency of the allegations of Count One of the information.
>
> See also Linden vs. United States, 2 Fed. (2nd Ed.) 817.

3. Assignment of Error No. 3 is similar in purport to the one just discussed, in that it raises the question as to the sufficiency of Count Three of the information, charging the defendant with the maintenance of a nuisance under the law in question. In support of this assignment of error, counsel contend that a single sale of intoxicating liquor is not sufficient upon which to predicate a verdict of guilty respecting that charge.

This contention seems to question the sufficiency of the proof rather than the sufficiency of the charges set out in Count Three.

That a single sale of intoxicating liquor may be sufficient to warrant a jury in returning a verdict of guilty against one charged with maintenance of a nuisance under the National Prohibition Act has been too frequently decided in the affirmative to require comment. The following cases are squarely in point and appear to conclusively refute the contention of plaintiff in error respecting the nuisance count.

> Fassolla vs. United States, 285 Fed. 378 (9th Circuit case decided in an opinion by Judge Gilbert).
>
> Barker vs. United States, 288 Fed. 249.
>
> Marshallo vs. United States, 298 Fed. 74.
>
> Singleton vs. United States, 290 Fed. 130.
>
> Stoecko vs. United States, 1 Fed. (2nd Ed.) 612.

4. **Alleged error in admitting testimony of M. O. Nelson as to general reputation of Plantation Inn.** The fourth assignment of error has relation to the testimony of M. O. Nelson respecting the general reputation of Plantation Inn, the house conducted by Fred. T. Merrill, plaintiff in error. It is charged that the Court erred in permitting Mr. Nelson to testify as to the general reputation of the house as

being a place where intoxicating liquors were commonly kept, sold and dispensed.

Counsel for Merrill rely principally on the case of United States vs. Jourdine, Fed. Cases 15, 499, to support this contention of error.

It is admitted that authorities do not universally agree respecting the admissability of general reputation by the prosecution in proof of an information or indictment charging the maintenance of a nuisance; but we have no hesitance in asserting that the weight of authority is in favor of the admission of such evidence.

The Circuit Court of Appeals (5th Circuit), in the case of Ryan, et al. vs. United States, 285 Fed. 734 (decided December 19, 1922), has decided that it is proper for the Government, in the prosecution of a charge of maintaining a common nuisance under the National Prohibition Law, to prove that the reputation of the premises maintained by the defendants was bad.

The opinion of the Court in the case of Anzine vs. United States, 260 Fed. 827, we consider to be decisive of the question. Judge Gilbert, who wrote the opinion, after considering the authorities upon

both sides of the question, concluded that in the prosecution for the keeping of a house of ill fame, common reputation is admissable against the defendant. The reasons annuciated in support of that ruling are, we have no doubt, equally applicable to the situation here, and we deem it unnecessary to go further into that phase of the case.

5. **Alleged error in admitting testimony of W. H. Nickell as to prior sales.** The error claimed with respect to the admission of the testimony of W. H. Nickell as to prior sales is, we believe, equally without merit.

With respect to this proposition, the case of M'Donough, 299 Fed. 30-40, appears to be upon all fours with the Merrill case. It was there claimed that the trial court erred in admitting, in proof of a nuisance charge, evidence of prior distinct sales of intoxicating liquor. Upon this point we quote from the opinion of the Court as stated by Judge Morrow:

> "There was also evidence tending to show sales of drinks to others served by Rice while the parties were negotiating for the Perrucci purchase; also testimony tending to prove the

> sale of whiskey by Rice on the 16th of March, one week prior, and on two other occasions—once four and one-half months before and again about two and one-half or three months before. There was evidence tending to prove that M'Donough became suspicious of the sale of the whiskey to Perrucci and closed the saloon a few days after the sale. All this testimony was relevant to the charge of maintaining a common nuisance and admissable upon that issue, and separate and distinct from the evidence adduced to prove the sale of five gallons of whiskey on March 23, 1923, not obtained by seizure, which was admitted by the defendant Rice, and was all separate and distinct from the subsequent search and seizure of liquor at 162 11th on April 25, 1923."

Many other authorities could be cited in point; but we think this sufficient for the purpose. Nickell's testimony concerning prior sales was admitted as pertinent to the charge of maintaining a nuisance, and, we submit, properly so.

6. Alleged error in refusing to admit evidence on behalf of defendant as to conduct of business.

Assignment No. 6, we think, need hardly be noticed. The defense attempted to elicit from Russell Underwood, a witness for Merrill, testimony respecting the conduct of the house in question by the defendant subsequent to the time of his arrest on the charge in question, which was on May 15, 1923. Clearly, this would be self-serving, and equally clearly, we think, the ruling excluding such testimony was proper.

It is to be noted that in the closing paragraph upon this subject (Page 25, Brief) counsel again make reference to the testimony of Nickell and there assert that the sales testified to by him were made **months** before the date charged in the information. This is perhaps inadvertent; but we deem it proper to call the Court's attention to the fact that the sales testified to by Nickell as having been made by Merrill occurred only some three weeks prior to the date of the sales charged in the information.

7-8. Alleged error in admitting record of prior conviction of defendant. We now come to a consideration of assignments of error Nos. 7 and 8. Since they pertain to the same subject matter, we shall not undertake to discuss them separately, but

rather as a single issue.

Upon cross-examination, plaintiff in error was asked whether or not he had ever been convicted of a crime. To that question he replied, "No sir." Thereafter, he was asked specifically if it were not a fact that on the 6th day of September, 1910, he entered a plea of guilty to an indictment charging the crime of selling liquor in quantities less than a gallon at the Twelve Mile Roadhouse. Again the answer was, "No sir." The Court then permitted the prosecution to introduce into evidence the record of the Circuit Court of the State of Oregon for Multnomah County, showing that Merrill was, in fact, convicted, upon his plea of guilty, of the offense above indicated, and that he was thereupon fined $250.

Merrill takes exception to the admission of that evidence upon the ground that it was not competent to affect his credibility. In order to determine whether or not this position is well taken, it becomes pertinent to examine the statutes under which he was thus convicted.

Section 4938 (Chapter 2, Title XXXVI) L. O. L., provides, among other things, that no person shall be

permitted to sell spiritous, malt or vinous liquors, etc. in less quantities than one gallon without having first obtained a license from the County Court of the proper county for that purpose.

Section 4940 (same chapter and title) L. O. L. fixes the amount of the license for one engaged in the sale of such liquors in quantities less than the amount above specified at $400 per annum.

Sections 4945 and 4946 (Chapter 2, Title XXXVI) L. O. L. imposes upon prosecuting attorneys, sheriffs, constables and justices of the peace the duty of making complaint of all offenses arising under the act to the Grand Jury at the next term of the Circuit Court of the county in which the offense may have been committed after such violations, and imposes upon the County Clerk the duty of delivering to the Grand Jury a correct list of all persons holding licenses under the provisions of the act in question within the county.

Section 4947 (Same Chapter and Title) L. O. L. makes it a misdemeanor to violate any of the provisions of the act and provides for a violation thereof a fine of not less than $200 and not more than $400.

Section 4948 (Chapter 2, Title XXXVI) L. O. L. reads as follows:

> "It shall be the duty of the Grand Jury, at each and every term of the Circuit Court in any county in this state to make a strict inquiry and return bills of indictment against every person violating any of the provisions of this act."

From the foregoing it becomes apparent that the act creating the offense for a violation of which Merrill was convicted in 1910 was a revenue act of major importance to the State of Oregon. The weight and significance which the state then attached to the act and to the source of revenue thereby created is apparent upon a reading of the sections which impose upon public officials and grand juries the duty of seeing that the law should be strictly observed.

The act is in many of its aspects, very similar to the National Prohibition Law. Both concern the selling of intoxicating liquors. Both are revenue acts. Both are misdemeanors. The punishments following a violation of the two laws under consideration differ somewhat in degree, but not in kind.

If moral obloquy of the sort and degree tending to affect the credibility of a witness would follow upon a violation of the National Prohibition Law, the same would certainly be equally true with respect to a violation of the Oregon Liquor License Laws. If it is an offense to perpetrate a fraud upon the Government by withholding revenues justly due, would it not also be a fraud upon the State to do likewise with respect to a state revenue law? So far as moral delinquency is concerned, it is just as great an offense to cheat a blind Chinaman out of a nickel as it is to defraud the corner grocer out of five dollars.

Tiemeyer vs. United States, 280 Fed. 322.
Parks, et al, vs. United States, 297 Fed. 834.
Fields vs. United States, 221 Fed. 242.

are, we think cases in point. The Fields case we deem particularly applicable in that it sets out the reason for holding that evidence of prior similar offenses is admissable on cross-examination as affecting the credibility of a defendant who undertakes to testify in his own behalf. Judge Knapp, speaking for the Court in the Fields case, points out that the defendant, in violating the federal revenue laws, was guilty of a fraud upon the Government, and adds:

> "We are not prepared to endorse the proposition that no reflection is cast upon the character of a witness by proof that he has been convicted of cheating the Government."

By his plea of guilty to the indictment returned against him by the State Grand Jury, Merrill stands convicted of precisely the same sort of offense in that he cheated and defrauded the state government by failing to take out a license covering the sale of spiritous liquors in less quantity than one gallon. The fact that a considerable period of time had elapsed between the conviction under the State Liquor Laws and the trial for violation of the National Prohibition Law, certainly would not relieve Merrill of the stigma which attached to the first offense, nor detract anything from the weight of the same as affecting his credibility.

It is true that the admission of the record of prior conviction was a mere incident in the trial and might perhaps as well have been omitted so far as the result of the prosecution was concerned. Nevertheless, we submit that it was competent and proper as bearing in some degree upon the credibility of the defendant.

Plaintiff in error further contends that, having permitted the cross-examination of Merrill touching the prior conviction, he should have been permitted to explain the same and that it was error to deny him that privilege. Had Merrill, when questioned, admitted the former conviction, there might have been, under some authorities, a color of reason in this contention; but Merrill denied the conviction. The matter should, we submit, have stopped where his answer put it. Such, however, was not the case, for, as will appear from the reading of such of the testimony of Merrill as is set out in the record, despite the ruling of the Court, Merrill did undertake to explain away the conviction, as witness the following on cross-examination:

> "I saw this and read it at the last trial. I never was arrested in my life. I never sold a drink in my life, and my bar-tender and waiter sold a glass of port wine, a glass of beer, at half past one o'clock at night, and I was sick in bed at the time, and this trial—it never came to trial."

And again, on re-direct examination.

"Q. (By Mr. Goldstein) Now, counsel asked you if you had been convicted of crime and you denied

it, and then introduced in evidence Government's Exhibit 14, in which George Stewart and Fred Horn are joined with you to the effect that in 1910 you were charged with the offense of selling liquor in quantities of less than one gallon without a license. Who were George Stewart and Fred Horn?"

A. They was a waiter and the other man that worked there for me.

Q. Were you present in your establishment on that day in 1910?

A. I was not. I was sick with a broken collar bone.

Q. Why did you deny that?

A. (over objection by Mr. Stearns) I was never in court.

Q. Explain that. Why did you deny that?

A. Because I never was in court.

Q. What are the facts concerning that?

COURT: I don't think you can go into that case.

Q. Had you ever appeared in court?

A. No, sir."

From what has been said it will be observed that

the witness did undertake to exploit to the jury his version of the incident in question, and his testimony in that regard was permitted to stand. The jury had the benefit of it for whatever it may have been worth, and it is not easy to see how the defendant could have any just cause for complaint on that score.

9. **Alleged error touching cross-examination of M. O. Nelson.** In answer to the contention that the Court erred in restricting the cross-examination of M. O. Nelson, a witness for the Government, we have only to refer to the record. An examination of Mr. Nelson's testimony, of the objections taken and the rulings of the Court, as they are set down, will suffice.

At this point it may not be amiss to say that the trial of this case extended over a period of nine days, and that the transcript of testimony covered some 550 pages. The Appellate Court will not have the advantage (if such it might be termed) of the entire record.

Woven into the brief of plaintiff in error is a veiled but unmistakable undertone of criticism of the trial court, carrying with it an evident aspersion upon the fairness of the judge who conducted the

case. Innuendo is a dangerous and often-times very difficult thing to meet. Suffice it to say, that greater patience and fairness on the part of the Court, under equally trying circumstances, could not have been expected nor given.

9-10. **Alleged error touching cross-examination of A. B. Gates and Miss Ruth Meade.** We now come to a consideration of assignments No. 9 to 24 inclusive, having to do with alleged error in restricting the cross-examination of A. B. Gates and Miss Ruth Meade, witnesses for the prosecution. It is, of course, fundamental in the law of evidence that the defense, in a criminal prosecution has the right to a full cross-examination of witnesses for the prosecution touching their examination in chief, and within proper bounds of any collateral matters, reasonably calculated to test credibility, and that undue restriction of that right, to the material prejudice of the defendant, constitutes reversible error. It is, we believe, equally fundamental in the law that, subject to the right above annuciated, it is not only the privilege, but the positive duty of the trial court to hold such cross-examination within reasonable bounds, in order that unnecessary confusion of issues may not ensue.

Under the caption "Distinction Between Cross-Examination and Extrinsic Testimony," Professor Wigmore has this to say anent the subject:

> "Two things must be kept in mind about such rules. (1) The question of **Relevancy** is not touched by them. The restriction is based wholly on some doctrine of Auxiliary Policy. It prescribes that such-and-such evidence **if relevant** is to come only from specific sources. Its relevancy is still open to question . . . . Thus, there is **no virtue in the cross-examination as such** with reference to the admissibility of the alleged act. The notion is not that because we are cross-examining, therefore we may get admission for this or that fact; for the fact cannot go in if it is not relevant . . . ."
>
> Wigmore on Evidence, Vol. 2 (2nd Ed.) Section 878.

It therefore becomes of prime importance here to determine the kind and character of the subject matter sought to be probed into by the defense in its cross-examination of these witnesses and the relevancy and materiality of such matter, if any, to the charge upon which the defendant was being

tried, ir order to test the propriety of the rulings claimed as error.

Since counsel for plaintiff in error have undertaken, in their brief, to brand Mr. Gates, Miss Meade and Mrs. Johnson as "informers," a term synonomous with the approbrious sobriquet "stool pigeon," both odious as applying to a class of persons generally associated with crime and the underworld, we think it not inept again to remind the Court at this point that none of the three persons named belonged to the type adverted to and with which counsel persistently, throughout the trial of the case sought, and now before this Court, seeks to associate them.

Mr. Gates was an officer of many years experience, of high standing and unimpeachable character. Mrs. Johnson and Miss Meade were and are splendid and courageous women, and in doing what they did to assist the officer were actuated by the purest of motives. It is true that, in order to gain admittance to Merrill's roadhouse and to procure evidence of law violations going forward there, they did feign a certain degree of intoxication. Had they not done so, Merrill would never have been brought to justice, for Merrill selected his patronage with a nice degree of discrimination, and would have been quick

to suspect any persons entering his institution who did not carry with them an atmosphere of conviviality in the sense that that term would apply to the situation in hand.

It will be noted, upon a reading of Merrill's brief, that his counsel have taken the liberty of extracting excerpts from the testimony of Mr. Gates and Miss Meade and of commenting upon such excerpts, not in the natural order in which the testimony was given, but in such fashion as to satisfy the ends which counsel had in mind, namely: to make it appear, by thus twisting and distorting the facts, that the Court had committed error. We particularly invite the Court's attention to the paragraph at the foot of page 35 and at the top of page 36 of the brief of plaintiff in error, wherein counsel assert that immediately **preceding** and following the visit to defendant's premises, Gates had visited some seven other alleged roadhouses. Whether intentional or unintentional, this statement contains a vicious misrepresentation of fact. We again repeat what we have called attention to in our opening statement, namely: (and we wish to emphasize this because it is important) that the Merrill roadhouse was the first one visited by Mr. Gates, Miss Meade

and Mrs. Johnson or either of them. It was, in fact, the only roadhouse visited by these people on the night of the 10th and morning of the 11th of May, 1923. A reading of the record will make that fact very apparent.

It is true that Underwood, a taxi driver, who drove Mr. Gates and his party to the Plantation Inn, was a witness for the defendant, and that he claimed that Gates had liquor with him when he entered the taxicab at Portland, and that he (Gates) consumed the greater part of a flask of liquor on the way out. This was flatly contradicted by Mr. Gates, Miss Meade and Mrs. Johnson. Under the pretext then of lending color to the obviously false and utterly discredited testimony of the witness Underwood, who at the time of trial was in the employ of Merrill, it was sought to elicit upon cross-examination, from was sought to elicit, upon cross-examination, from Mrs. Gates and Miss Meade, statements that upon a subsequent visit to another roadhouse, Gates had taken liquor upon the premises. This was a most transparent attempt upon the part of the defense to confuse the issues by introducing evidence of subsequent and wholly disconnected matters into the trial of the man Merrill.

Of the eight roadhouses raided by the authorities at about the same time, but two were prosecuted in the Federal Court; the others went to the State Courts.

In the course of cross-examination, counsel repeatedly attempted, by cunningly framed questions, to put into the mouths of Government witnesses statements that prior to going out to the Merrill roadhouse they had received from the Sheriff general instructions as to what they should do in the course of investigating the various places under suspicion. In order to make it appear that such general instructions actually were given, counsel have cited in their brief certain excerpts from the testimony. (See especially Page 36, Brief of Plaintiff in Error.)

A reading of the testimony in the record will disabuse the inquiring mind as to any erroneous idea which might arise from a perusal of such excerpts. For instance, on page 105, Transcript of Record, in the cross-examination of Miss Meade the following questions and answers appear:

"Q. I will ask you whether or not it is not a fact that you received definite instructions as to all these roadhouses prior to going out to Merrill's place?

A. No, not about all of them.

Q. About how many of them?

A. I don't know.

Mr. Stearns: If Your Honor please, I don't see that that is in this case particularly.

A. May I say this? I wish to say this—that those cases were not all discussed at any one certain time or any certain place.

Court: You have talked about them several times with the officers?

A. Yes, sir.

Court: As you went from place to place you talked about them?

A. Yes. There was no definite outline given us.

Q. (by Mr. Goldstein) Was a discussion had as to any particular number of roadhouses prior to going out to Mr. Merrill's place?

A. No, there was not."

And the testimony of Mr. Gates and Mrs. Johnson, when read as given, will bear this out.

Apparently in an effort to lend color to counsel's misstatement that Gates had investigated some of

these roadhouses prior to the visit to the Merrill roadhouse, they set out, near the top of page 41 of their brief, the following question:

> "Now, I will ask you, Mr. Gates, if at any time prior to May 10, in making your investigations, you had occasion to use liquor as a means of inducing violations of law."

This question was clearly objectionable for two reasons: First, it was general and indefinite in tenor, relating to no particular time or place; and, Second, it contained the very obvious vice of an assumption that Gates had induced violations of law, which was, of course, untrue. The question did not in any way relate to the matter under investigation, not to the roadhouse situation as it existed in and about Portland on the 10th of May, 1923. The full text of the testimony of Gates adduced upon cross-examination is not before the Court; but we think there is sufficient in the record to disclose that no error was committed by the Court in limiting the defense in its inquiry respecting what may or may not have happened upon subsequent visits by the same persons to other roadhouses.

We also invite the special attention of the Court

to the testimony of Miss Ruth Meade, both as to the excerpts contained in brief of plaintiff in error and as to the fuller text set out in the transcript of record. It is to be noted that counsel conclude their quotations from the testimony of Miss Meade (at the top of page 47 of their brief) as follows:

"Court: That is as far as you may go.

Mr. Goldstein: May I take an exception?"

thereby leaving the impression that they were not permitted the privilege of requiring the witness to answer the question as propounded. This is grossly misleading and deliberately untrue. If the Court will first read the supplemental transcript of plaintiff in error, and then turn to page 102, Transcript of Record, the sham will at once become apparent. This is the matter that we advert to and which connects immediately with the matter last quoted above.

"Court: You are asking that question?

Q. (by Mr. Goldstein) Now, I will ask you, Miss Meade, whether or not you gave that testimony as we have read it to you at that time and under those circumstances.

A. **If I gave that testimony I was mistaken in that date that you asked me when I was in Sheriff Hurlburt's office.**

Q. Will you please answer the question. Did you give the testimony as I read it to you?

A. I must have if you have it written.

Court: But you say now you were mistaken.

A. **If I gave that testimony I was mistaken in the date asked me that I was in the office at that time."**

Counsel's cleverness in confusing and misleading the witnesses on cross-examination is only exceeded by his ability to make the record seem to say what is not the truth. For instance, witness the following (Page 47, Brief of Plaintiff in error).

> "We feel confident that no legal authority can be submitted by the Government that will justify the Court in restricting our right to impeach a hostile witness upon a most material inquiry, to-wit: **whether she had not testified on a previous occasion that, in accordance with their general instructions from the Sheriff, not only was liquor used by them in investigating these roadhouses, but that liquor was actually given to the taxi driver, just exactly as was testified to by the taxi driver Underwood in this case."**

A more deliberate perversion of the truth could

not well be imagined. Counsel know, and the record will show, that Miss Meade never at any time, either before or following the trial of Merrill, testified that liquor was actually given to the taxi driver just exactly as testified to by the taxi driver Underwood in this case, or at all.

Or, perhaps counsel do not mean what they say. Perhaps they mean simply to say that at a prior trial in the State Court Miss Meade had testified that, when necessary, they were to use liquor in the course of their investigations or roadhouses subsequent to the visit to Merrill's place on May 10th.

In summarizing the testimony of Mr. Gates, Miss Meade and Mrs. Johnson, counsel archly conclude that the trio were employed by the Sheriff to investigate eight roadhouses about the city; that the employment was a continuous affair, covering two or three successive days; that Miss Meade and Mrs. Johnson were each paid $50 for their services; that the party was reimbursed for expenses incurred, and that the money thus "exacted" from the public treasury was utilized in "imbibing intoxicating drink, dining on delectable viands and paying taxi fares," all of which has a most familiar ring, for we believe that we heard it twice thundered into the

ears of the jury during the two trials of this case in the Federal Court.

It is unnecessary to offer comment upon the obvious purpose of counsel in thus garnishing their brief. None of these parties can truthfully be said to have been in the employ of Sheriff Hurlburt. Mr. Gates was an independent federal officer, employed by the Government and paid by the Government, and taking orders from no one but his superiors in the Government Service. Miss Meade and Mrs. Johnson, were as we have already seen, volunteer social workers, who consented to accompany Mr. Gates, not as counsel would have the Court believe, for pecuniary reward, but out of the purest and loftiest of motives, namely: a desire to assist in abating the abominable cesspools of vice, which were operating upon the fringes of the city and which not only presented flagrant examples of disregard of law and decency, but were the rendevouz of denizens of the tenderloin, and their convenient and ready tools in the debauching of young girlhood.

We have no quarrel with the authorities cited by counsel touching the latitude to be allowed the defense upon cross-examination; but those authorities, as we read them, do not at all apply to the situation

here. What we mean may be best illustrated, perhaps, by adverting to the case of DiSalvo vs. United States, 2 Fed. (2nd Ed.) 222, cited and relied upon by counsel, wherein the Court said:

> "Where one of the defenses was entrapment, questions asked in cross-examination of a Government witness who was one of the parties to the alleged entrapment as to what transpired between them **prior thereto** were competent and their exclusion was error."

That unquestionably would be true; as applied to the facts in that case; but such is not the situation in the case before the Court. As we have before stated, the Merrill roadhouse was the first place of that character to be investigated by the government agent and his companions and was in no way connected with the subsequent investigations of other similar institutions.

We respectfully submit that the rulings of the Court upon the cross-examination, made the basis of assignments nine to twenty-four inclusive, were proper and devoid of error.

12. Alleged Error in Restricting Cross-Examination of Martha Randall. (Assignments 25 and 26.)

The error claimed with respect to the cross-examination of Martha Randall is of a piece with that which we have just considered.. Both in the direct examination of witnesses for the defendant and in cross-examination of witnesses for the Government, counsel for Merrill attempted to cast discredit upon Miss Meade and Mrs. Johnson by trying to make it appear that they were paid informers and common strumpets. Not only the questions thus put, but the manner and tone of voice of counsel in asking them, were artfully calculated to the ends which counsel sought to accomplish, namely, to shame and discredit Miss Meade and Mrs. Johnson in the eyes of the jury. The cross-examination of Miss Martha Randall, who recommended Miss Meade and Mrs. Johnson, was bent to the same vicious purpose. Therefore, the question adduced upon redirect examination as to whether Miss Randall knew the ladies in question to be reliable, responsible girls. The re-cross-examination which then followed was not at all calculated to test the credibility of the witness, but was simply a further attempt by counsel to cast odium upon Miss Meade and Mrs. Johnson.

13. Alleged Error in Restricting Cross-Examination of P. V. Rexford. (Assignment 29.)

This assignment of error seems to be so utterly devoid of merit as to require no comment, and we, therefore, pass it by.

14. Alleged Error in Restricting Cross-Examination of T. M. Hurlburt. (Assignments 38 and 39.)

What has just been said respecting the ruling of the Court as to the testimony of P. V. Rexford is equally true, we submit, respecting the rulings of the Court upon the cross-examination of Sheriff T. M. Hurlburt. A mere reading of the testimony will, we believe, conclusively refute the error claimed by the defendant upon this point.

As to all of the errors predicated upon limitation of cross-examination, we think that the reasoning of the Court in the recent case of West vs. United States, 2 Fed. (2nd), Page 210, should apply. In that case the plaintiff in error, with one McKay, was indicted for selling intoxicating liquor contrary to the provisions of the National Prohibition Act. Error was claimed upon the rulings of the Court in limiting the defendant's cross-examination of Government witnesses. In disposing of that point, Judge Ross, speaking for the Court, said:

"The first of such exceptions was taken to the ruling of the Court in refusing to permit the Government witness Simmons, who was a prohibition agent and who testified in substance that, besides visiting the defendant West's place of business, he had visited eight or ten other such places, to give a list of the various persons he had met at those places; plaintiff in error claiming that such testimony Would go 'to the credibility fo the witness . . .' We can see no merit whatever in any of the exceptions."

15. Alleged Error in Refusing to permit E. W. Aylsworth to Explain his Testimony as to the General Reputation of Plantation Inn. (Assignment 36.)

We cannot persuade ourselves that Assignment of Error No. 36, having to do with the testimony of E. W. Aylsworth, is worthy of serious consideration. Mr. Aylsworth perfectly understood the question propounded to him touching the reputation of the Plantation Inn, as will appear from a reading of the questions propounded and the answers given, and truthfully testified that that reputation was bad. Counsel's hectic attempts to procure the witness to alter his testimony were so transparently impro-

per that we are led to wonder at the optimism which now prompts this claim of error.

16. Alleged Error in Refusing to Admit Evidence as to the General Reputation of A. B. Gates for Truth and Veracity. (Assignment 32.)

> "Gates, the **informant,** who was responsible for this prosecution, was, of course, the principal witness against the defendant."

say counsel for Merrill as an opening shot in argument on the above point. Mr. Gates, the federal prohibition officer, was not responsible for this prosecution and was not the principal witness against the defendant. The defendant himself, by reason of his own flagrant disregard of law and decency, was responsible for this prosecution, and the testimony of the two ladies who accompanied Mr. Gates was in every respect as valuable, and in some respects more so, than the testimony of that officer.

It is singularly and indubitably true that at every turn of the case, from its inception until the verdict was in, counsel for Merrill sought to substitute Mr. Gates as the defendant in the case; and they are still at it.

It is undisputed that for many years Mr. Gates had made his home at Portland, Oregon, and it is

equally true that his neighbors, friends and associates for the most part reside in that city. For years Mr. Gates has been known at Portland as a law enforcement officer and, as the testimony shows, he has served there, prior to his appointment as general federal prohibition agent, in the capacity of deputy sheriff for Multnomah County. Had the reputation of Mr. Gates been subject to impeachment, in all fairness, witnesses for that purpose should have been called from among Mr. Gates' acquaintances and associates at Portland.

Therefore, when the defense produced as a character witness against Mr. Gates the disgruntled Sheriff from Medford, into whose county Mr. Gates had been sent some two and one-half years before for the purpose of checking liquor law violations which were going forward undisturbed under the Sheriff's nose, the Government interposed an objection which was sustained by the Court.

If we understand the law of reputation aright, the general rule relative thereto is that the impeaching witnesses must be able to testify to such reputation in the neighborhood where the witness has resided. In "Wigmore on Evidence," Section 1615, Page 365, Vol. 3, we find the rule expressed thus:

"**Reputation must be in the neighborhood of residence.** That discussion and comparison which contribute to the complete estimate and lead to the general concensus must, in the beginning, obtain its data from the experience of those who have had direct contact with the person in question, and it is these data of personal observation which are indispensable as a foundation of the final reputation. Such experience of observed instances is to be found only among those with whom the person ordinarily associates—that is, among the members of the community in which he lives and acts: Citing 1887, Brace, J., in Waddingham vs. Hewett, 92 Mo. 533; 5 S. W. 27. .(The witness to reputation) must be able to state what is generally said of the person by those among whom he dwells or with whom he is chiefly conversant—not by those among or with whom he may have sorjourned for a brief period and who have had neither time nor opportunity to test his conduct, acts or declarations or to form a correct estimate of either. A man's character is to be judged by the general tenor and current of his live and not by a mere episode in it.' Accordingly, it is com-

> monly said that the place or community on which the reputation is predicated must be the 'neighborhood' where he has 'resided.' The phrasings and definitions of this community and time of sojourning vary considerably; but nothing should turn upon precise words; and the general idea may be with sufficient correctness phrased in various forms."

Mr. Justice Harlan, speaking for the Supreme Court of the United States, in the case of Williams vs. United States, 168 U. S. 387-397, has stated the general rule in the following language:

> "Assuming . . . that the accused introduced evidence of his general reputation for integrity, it is clear that evidence, on behalf of the prosecution, that among a limited number of people employed in a particular public building his character was bad, was inadmissible. The prosecution should have been restricted to such proof touching the character of the accused as indicated his **general reputation in the community in which he resided**, as distinguished from his reputation among a few people in a particular building." (The underscoring is ours.)

Of course, we do not claim that the facts in the Williams case are similar to those in the case at bar; yet, we do submit that the general rule there laid down, limiting proof of general reputation to the community in which the witness reside, is correct. We further contend that under the facts in the instant case, there was no reason for a depurture from the general rule as above expressed.

Touching this phase of the subject, (page 66 of their brief), counsel complain that they were not permitted to develop by the witness Carroll what Mr. Gates was doing while in Medford. Upon a reading of the testimony of Mr. Gates adduced on cross-examination, it will be observed that he already had testified as to his purpose in being at that place covering the short period adverted to. That testimony stood undisputed, and there was no attempt to impeach him upon that score.

Again, on page 68, Brief of Plaintiff in Error, counsel naively remark that it is quite evident that Mr. Gates never stayed in Portland long enough to acquire a reputation in that city.

Why "quite evident?" Where is the testimony to bear out that statement? It is a mere naked assumption, wholly unjustified by the facts.

The facts disclosed in the cases cited by plaintiff in error to sustain their contention on this point bear no resemblance to those in the case at bar. In the Cushenberry case, 157 Mo. 168, relied upon by the defendant, the man whose reputation was under attack was **"a nomad of such malodorous reputation** that soon after his arrival in Chilicothe he was pointed out **as a house-breaker.** If the reputation of such a one could not be impeached in the locality **where he last lingered,** the result would be he could not be impeached at all . . . ."

Mr. Gates was neither a nomad nor a house-breaker. He was a reputable citizen and an honest, efficient and fearless officer, with a home and family and a fixed habitation.

In the case of Brown vs. Perez, 89 Tex. 282, cited and relied upon by the defendant, the Court states certain exceptions to the general rule that evidence tending to impeach the reputation of a witness for truth and veracity shall have relation to the neighborhood in which such witness resides, and concludes that no definite rule can be stated which will apply to all cases. The Court in the instant case had heard the testimony of Mr. Gates and other witnesses and was, we submit, in a position to be ad-

vised as to whether, under all of the circumstances of the case, it were expedient and proper to admit in evidence the testimony sought to be elicited from Carroll. In the exercise of sound discretion and in pursuance to the general rule of law applicable to the situation, the Court refused to admit such testimony. This did not deny the defendant the right to call other impeaching witnesses from among Mr. Gates' neighbors and associates at Portland had they been able to do so.

Again we submit the correctness of the Court's rulings to the judgment of this tribunal, believing that no error will be found therein.

17. Alleged Error in Instructions Given and Refusal to Give Requested Instructions. (Assignments 40 to 50 Inclusive.)

Touching contentions of plaintiff in error under this heading, lettered (A), (B) and (C) nothing further need be said, as the points there raised are fully considered and supported by authorities, cited elsewhere in this brief.

Touching the contention denominated (D) respecting the testimony of the witness Nickell, we deem it sufficient to point to the ruling of this Court in the

case of M'Donough vs. United States, 299 Fed. 30-40 wherein it is held that in the proof of a nuisance charge, evidence of prior distinct sales of intoxicating liquor is admissible. In that view of the matter it would seem that the Court would not be required to place upon Nickell's testimony the limitation requested by the defendant. In any event, even under the defendant's own theory, we submit that the Court in his instructions sufficiently covered the point in question, for immediately following the instructions as to the materiality of the date alleged in the information, we find the following language:

> "But the offense here charged is an offense which was committed at the time that Gates and the two women went from here to Merrill's place, that is the offense charged and it must be proved. You will remember the circumstances: that the parties went out on the 10th and remained there until the 11th in the morning, and then returned home. Now ,that is the charge, and that is the one that must be proven in this case."

18. Alleged Error in Refusing to Instruct the Jury Upon the Defendant's Theory of his Defense. (Assignment 48).

In support of the claim of error under the above caption, counsel for the defendtnt contend that it was their theory that the defendant was entrapped into the commission of a crime and that the trial court erred in failing to present that aspect of the defense properly to the jury in his instructions. Because of that claim, it would seem important to examine the testimony of the defendant Merril, with a view to determining whether or not he was entitled to such instruction. On direct examination Merrill flatly and unequivocally denied that he had sold any liquor whatever to the officer or to his companions as charged in the information. Under cross-examination he reiterated this denial; albeit when pressed he did admit (page 127, Transcript of Record) that upon Mr. Gates asking him for Scotch, he had sold him a drink of "ginger ale" and charged him 50c therefor.

> "After he had bought a bottle of ginger ale and he came back he bothered me again there, insisted upon—wanted to know if I couldn't find one drink of Scotch, and Islid this bottle over to him to get rid of him. I didn't think he knew what he was drinking.

Q. (By Mr. Bynon) You thought he didn't even know what he was drinking?

A. I don't think he knew what Scotch would be anyway."

And again:

"Q. Now, when this party (Mr. Gates, Mrs. Johnson and Miss Meade) left on that occasion you say they had a package containing two pint bottles of liquor?

A. They had a package.

Q. It was wrapped up in newspaper?

A. Yes, sir.

Q. You say that Charlie, the porter, gave it to you and you handed it to the guests?

A. I handed this to them when they went to go away.

Q. Who did you hand it to?

A. I handed it to Mr. Gates. I said "this is something you left behind the chair." He never denied it.

Q. Did you see these people come in with the package when they came that night?

A. No sir. I didn't see them come in.

Q. You didn't see them come in.

Q. You didn't see them bring the package in?

A. I didn't see them come in at all. I was in the kitchen.

Q. You say there were two pint bottles in that package?

A. There was a package. I didn't know what there was because I was busy. I laid it right there.

Q. Didn't you testify on direct examination there were two pint bottles of liquor in that?

Q. That is the inference that I drew—the two shaped bottles— the package.' '

The above admissions by the defendant assuredly helped him none with the jury; yet, as bearing upon the question of entrapment, they certainly cannot be construed in the light of out and out admissions of guilt so as to entitle him to special instructions upon that point. We submit that under the evidence in this case, it was not at all encumbent upon the Court. to instruct on the question of entrapment.

"Where the evidence shows without con-

flict that the Government witness did no more than offer to buy liquor, thus affording the plaintiff in error an opportunity to violate the law, there is no entrapment."

Jordan vs. United States, 2 Fed. (2d) 598.

Murphy vs. United States, 2 Fed. (2d) 599.

Johnstone vs. United States, 1 Fed. (2) 928 (9th Circuit).

However, instructions upon entrapment were given, and we believe that they were both apt and ample.

"A conviction will not be set aside because of refusal to give instructions in the language requested by the accused's counsel, to the same effect as instructions given by the court."

Stubbs vs. .United States, 2 Fed. (2d) 468.

The trouble with the authorities relied upon by plaintiff in error to support the contention under consideration—as we read them—is what they do not fit the facts in the case at bar.

CONCLUSION.

We could not hope, and, indeed, we have no wish to emulate the indubitably splendid rehetorical

flourish with which counsel polish off their argument; yet, perhaps a brief rejoinder thereto may be in order.

It is true ,as repeatedly stated by counsel and reiterated in their conclusion, that the defendant in this case is sixty years of age; but that offers no excuse for his offense in having conducted on the outskirts of Portland a notorious house of evil repute, where the law was mocked and trampled under foot, decency and modesty discarded, and young girlhood schooled in the ways of debauchery and sent on the road to destruction. The age of the defendant, we say, offers no excuse for such conduct, but rather adds to the gravity of his offense.

That the rights of this defendant during the course of the trial were not safeguarded by the Court is a statement, which in our opinion, reflects no credit upon his counsel. The case is just a rum house case, with nothing to distinguish it from other similar prosecutions, save the notorious character of the defendant and of the house which he conducted, and his ability to employ counsel schooled in the art of making much out of little. We submit that the alleged errors relied upon by the defendant

Merrill are without merit and that the judgment of the District Court should be affirmed.

Respectfully submitted,

GEORGE NEUNER,
United States Attorney.

J. O. STEARNS, Jr.,
Assistant United States Attorney.

No. 4503

United States Circuit Court of Appeals

For the Ninth Circuit /2

FRED T. MERRILL,
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

Petition for Rehearing

Upon Writ of Error to the United States District Court for the District of Oregon

BARNETT H. GOLDSTEIN,
Attorney for Plaintiff in Error
1225 Yeon Building, Portland, Oregon

FILED
JUN 2 5 1925
F. D. MONCKTON,
CLERK.

No. 4503

United States Circuit Court of Appeals

For the Ninth Circuit

FRED T. MERRILL,
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

PETITION OF PLAINTIFF IN ERROR FOR REHEARING

Upon Writ of Error to the United States District Court for the District of Oregon

---

In applying to the court for a re-hearing of this case, we do so, with the hope of persuading a reconsideration of the following points urged by us on the argument of this appeal, which we respectfully submit are deserving of more than the passing mention they received.

I.

Assignment II—Insufficiency of Count Charging Possession. Assignment XVII—Error in Instruction Thereon

The court disposed of these assignments by stating that they had been decided adversely to the plaintiff in error, and cited the case of Nunn vs. U. S. 4 F. (2d) 380, which it is true held that an information charging that defendant had in his possession a quantity of intoxicating liquor, is sufficient.

Assuming that the court has thereby committed itself to a ruling, which is so clearly at variance with the decisions of other jurisdictions (U. S. vs. Illig, 288 Fed. 939), (U. S. vs. Cleveland, 281 Fed. 248), (Hilt vs. U. S. 219 Fed. 421), (U. S. vs. Dowling, 278 Fed. 630), we still contend that we were entitled to an instruction, in line with the clear scope of the 18th Amendment, as sought to be carried into effect by the National Prohibition Act.

In his instructions to the jury, the trial judge said:

> "If you believe Merrill had possession of intoxicating liquor, you should find him guilty." (Trans., p. 163.)

We do not believe that Congress ever suspected that a mere rule of evidence, plainly intended as such, would in time rise to the dignity of a statutory crime.

Section 3 of the National Prohibition Act must necessarily furnish the authority for the creation of this offense, and unless it plainly and unequivocally makes the mere possession of liquor, without exception, an offense, then we submit the court erred in the instruction as given.

Section 3, omitting the portions thereof, that are not material, reads as follows:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, * * * possess any intoxicating liquor except as authorized under this act."

The act recognizes the right of possession and use of intoxicating liquor at certain places and under certain circumstances, and makes such possession illegal only when accompanied by such specific circumstances as would render such possession in violation of law. The trial jury received no such construction of the law, from the instruction as given. The jury was plainly told that if Merrill possessed this liquor, he was guilty; this without the slightest qualification or modification, notwithstanding that the court's attention was specifically directed thereto (Trans. p. 173).

If the instruction as given is the law, then every person who happens, even temporarily, to have in his custody a piece of baggage, a box, a garment or

a parcel in which there may be intoxicants, would be declared guilty, though he may not have intended to use or possess such liquor in violation of law. It would mean that if a passenger boards a crowded train and lifts a suit case from a seat he desires to occupy, then he would be guilty of possession, if that suitcase contains the smallest conceivable quantity of intoxicating liquor, and the fact that such passenger is the most devout religionist or the most active and ardent prohibitionist would not release him from the relentless grasp of the law; it would mean that if a passenger in the act of boarding or alighting from a train delivers his hand bag to a brakeman stationed at the foot of the steps the brakeman becomes a lawbreaker if the hand bag contains intoxicants, and if the brakeman repeats the act a second and a third time he may be sent to the penitentiary; it would mean that if a passenger moves an overcoat belonging to another, from one to another seat or places it in the rack or hangs it on a hook, either with or without the consent of the owner, he commits a crime if in one of the pockets of that overcoat there happens to be a bottle containing intoxicating liquor; it would mean that if the driver of an automobile passes a friend or stranger a-foot and carrying baggage and as an act of kindness invites the footman to ride and assists him to lift his baggage into the automobile, the driver violates the prohibition law if that baggage had concealed in it any quantity of intoxicating liquor.

The case of State vs. Cox, 91 Ore. 518, is squarely in point. The defendant, a hotel porter, was charged with unlawful possession, in violation of a statute similar to the National Prohibition Act. The trial judge gave the same instruction as was given in this case, and the jury felt compelled to convict.

The Supreme Court, speaking through Justice Johns, in holding such instruction to be in error, said:

> "If the mere act of a porter in lifting a suit-case which contained intoxicating liquors is within itself a violation of the statute in question, then any minister, old lady or the most radical prohibitionist, through chance or design might be made the innocent victim of having intoxicating liquor in his or her possession, and under the instructions given by the trial court in this case could be convicted of that offense. We do not believe that the statute should be so construed, and prefer to adopt the 'rule of reason'."

We hope, that inasmuch as the opinion makes no specific mention of this assignment, that the court will feel disposed to grant a rehearing, so that this matter may be more fully argued.

II.

Assignment VII—Error in Admitting Record of Conviction of Misdemeanor

The court, at the time of the argument, was ap-

parently impressed with the merit of this assignment, yet in its opinion the court states as follows:

> "There is a conflict of authority upon this question in the different circuits, but the great weight of modern authority seems to sustain the ruling of the court below."

The court cited the following cases, all of which have been examined, and we respectfully submit that most of them are not only not in point, but that the remaining cases can be readily distinguished.

1. Fields vs. U. S. 221 Fed. 243 (Fourth Circuit).

In that case the defendant on trial for a felony was cross-examined as to a conviction of a similar offense. (This case is not in point, as the prior conviction of a *felony* is involved.)

2. Christopule vs. U. S., 230 Fed. 788 (Fourth Circuit).

In that case the defendant was asked on cross-examination, if he ran a "blind tiger," which implied that he sold liquor unlawfully. (This may or may not have been a felony under the laws of the State of South Carolina, wherein the trial was held, but in any event it was for a *similar offense*.)

3. Gordon vs. U. S., 254 Fed. 53 (Fifth Circuit).

In that case, the defendant was charged with operating a still, and upon cross-examination, he

was asked if he had not been convicted for the same offense two years before. (This referred to a prior conviction of a *felony.*) In his opinion the court specifically said:

> "He may be impeached like any other witness, by proving that he has been *convicted of a felony;* the punishment provided in the statute, for the offense of which the plaintiff had previously been convicted, made it a felony."

4. MacKnight vs. U. S., 263 Fed. 832 (First Circuit).

In that case, the defendant was asked, on cross-examination, if he had not been convicted of forgery and sentenced to the penitentiary. (This referred to a prior conviction of *felony.*)

5. Tierney vs. U. S., 280 Fed. 323 (Fourth Circuit).

In that case, the defendant was indicted for carrying on the business of a retail liquor dealer, and he was asked concerning a prior conviction of a similar offense. (This related to a prior conviction for a *felony,* and a *similar offense.*)

6. Krashowitz vs. U. S., 282 Fed. 599 (Fourth Circuit).

The defendant was indicted for violating the liquor laws, and the court held that he may be asked

on cross-examination if he had not been guilty of other *like offenses.*

7. Murray vs. U. S., 288 Fed. 1008 (D. C.).

This was an appeal from the Supreme Court of the District of Columbia, and in that case the defendant was asked on cross-examination, if he had not been convicted of a certain misdemeanor, but the court held that this was only admissible by reason of section 1067 of the District Code, which provided that the conviction of a crime might be given in evidence to effect his credit as a witness, and that the word 'crime' used in that section, included both felony and misdemeanor. (*In this case we have no Federal or State Statute governing the proceedure, but are controlled by a common law.*)

8. Nutter vs. U. S., 289 Fed. 484 (Fourth Circuit).

In that case, the defendant was charged with the crime of selling morphine, and he was asked if he had not been previously convicted of this crime. (This plainly related to a *prior conviction of a felony,* as well as a *similar offense.*)

9. Wheeler vs. U. S., 293 Fed. 588 (Fifth Circuit).

In that case the court held that a defendant may be asked, on cross-examination, if he had not previously been convicted of a *felony.*

10. Jones vs. U. S., 296 Fed. 632 (Fourth Circuit).

The defendant was convicted of a violation of the prohibition act, and the court held that there was no error in permitting cross-examination of the defendant, as to *other similar offenses.*

11. Parks vs. U. S., 297 Fed. 834 (Fourth Circuit).

The defendants were convicted for violation of the National Prohibition Act, and the court held that the cross-examination of Parks, as to a former conviction, was competent. (The opinion does not state the nature of the conviction, whether it was for a felony, similar offense, or a misdemeanor.)

12. Neal vs. U. S., 1 F. (2nd Ed.) 637 (Eighth Circuit).

This case originated in the Western District of Oklahoma. The defendant was convicted of selling liquor to an Indian. A witness for the defendant was asked on cross-examination, if he had not been convicted of a violation of a municipal ordinance. The court held that the rules of evidence governing Federal courts in criminal cases arising in that district (Western District of Oklahoma) are those which were enforcible in Oklahoma Territory at the time of the admission of Oklahoma as a State; that when no Oklahoma decision can be found on the

question, it may be generally held that the violation of a municipal ordinance is not a crime, and a conviction therefor can not be shown. The court there cited with approval, the case of Glover vs. U. S., 147 Fed. 426:

> "The general rule is, that the crime must rise to the dignity of a petit larceny."

The court therefore reversed the conviction on the grounds that the admission of this evidence was prejudicial error. The court further held:

> "The cases, holding it permissible to show former conviction of a witness of the violation of the National Prohibition Act, are not in point, for the reason that a violation *of that act* is a crime."

13. Liddy vs. U. S., 2 F. (2nd) 60, (U. S. District Court of Pa.).

In that case, the district judge merely held that a defendant charged with the illegal sale of liquor, who as a witness in his own behalf, testified that he had never previously sold liquor unlawfully, opened the door for cross-examination as to *whether he had previously been convicted of such offense.*

14. Williams vs. U. S., 3 F. (2nd) 129 (Eighth Circuit).

In that case, the court held that a witness may

be asked on cross-examination, whether he had been convicted of a *felony*.

It will therefore be seen that practically all of the cases cited in support of the court's decision are cases where the prior conviction elicited was either that of a felony or a similar offense, neither of which is applicable here.

Furthermore, we find that a number of the earlier cases cited from the Fourth District were distinguished in the recent case of *Newman vs. U. S.* 289 *Fed.* 712 (4th Circuit). In the case last mentioned, the defendant was on trial for illegal sale of narcotics. On cross-examination, the defendant was asked if he did specialize in abortions and engage in thefts. On his denial, testimony thereof was permitted to be given. It was held that permitting such cross-examination and the introduction of such testimony, although part of it was afterwards stricken out, was prejudicial and reversible error. The court quoted with approval the case of *Bullard vs. U. S.* 245 *Fed.* 837, where the accused was convicted for illicit distilling. On cross-examination he was asked if he had not been found guilty of assault. He answered by saying that the case was quashed. The government then offered the judgment roll to show that the case had not been quashed, and over objection the same was admitted in evidence. The court in reversing the judgment said:

> "We are not aware of any theory upon which this ruling can be defended. The subject matter of the question addressed to the defendant was obviously collateral to the issue on trial, and the government was bound by his answer. Indeed, it is elementary that the contradiction in such a case is not permissible. The district attorney in pursuing the inquiry wholly unrelated to the charge under investigation took the risk of replies which would defeat the effect to show that the witness was a man of bad character or otherwise unworthy of belief. The prejudicial effect of this evidence can scarcely be doubted. That the admission of this evidence was reversible error seems to us an unavoidable conclusion."

Our case is clearly in point. The defendant denied that he had been previously convicted, and in line with the last quoted authority, the government was bound by his answer, inasmuch as such prior conviction was not only extremely remote but constituted an entirely separate and distinct offense, in no wise related to the issue on trial. Over our objection, the prosecution was permitted to introduce the judgment roll.

Moreover, we were of the opinion that the cases submitted in our brief, and argued before the court, were sufficiently persuasive and controlling. In particular the case of *Solomon vs. U. S.*, 297 *Fed.* 82, supported by numerous precedents and logical reasoning, discusses the subject so exhaustively and

thoroughly as to permit no other conclusion but that the trial court erred in admitting this testimony. We are frank to confess our keen disappointment that the opinion utterly ignored our authorities, without even attempting to discuss or distinguish same, and we earnestly petition the court to reconsider this assignment, to the end that a frank discussion may be had of the cases submitted by us in support of our contention.

III.

Assignments 10-11—Error in Restricting Cross-Examination

The opinion disposes of these assignments, by merely citing the case of West vs. U. S., 2 F. (2d) 201, and adopting the phrase "These exceptions hardly deserve mention."

We cannot help but express our deep mortification that the time and effort expended by us in developing these assignments should receive so little consideration. Frankly, we considered them of the utmost importance, and we hope that the court will see its way clear to point out to us wherein the cross-examination of the government's witnesses was immaterial.

So far as the case of West vs. U. S. supra, is concerned, it hardly furnishes a fair criterion. In that case the government witness was asked to give a list of the various persons he had met at other

places. (This we did not do.) The waiter was asked what were his general duties. (This we did not rely upon.) Some cross-examination was permitted of the woman as to what she did at the other place. (We were not even allowed that latitude.)

Without intending to repeat what has already been fully said in pages 34 to 54 of our brief, we contend we are justified in our claim that we were unduly restricted in our cross-examination of government's witnesses, particularly when it was within the scope of our defense theory that the liquor introduced on defendant's premises was liquor that the witnesses themselves had introduced, just exactly as was done by them on a previous occasion, *pursuant to their general instructions for investigating all roadhouses.*

Inasmuch as the opinion does not discuss this evidence, or its materiality on account of the nature of our defense, nor does it discuss the cases cited, we are prevented from knowing just wherein the cross-examination sought to be pursued was immaterial, or so trivial, as indicated by the opinion. Surely the time taken for the trial of this case should not be taken into consideration, when the court is not apprised of the time taken by the government in the presentation of its case in chief, nor how much of the time was devoted to the selection of a jury and arguments of counsel! It must be borne in mind that the defendant, at the age of 66, faces a jail sentence!

May we ask the court to kindly re-consider these assignments and to peruse again our brief upon these points, and we cannot help but feel confident that a careful analysis of the record, the nature of the cross-examination, its purpose and object, and its applicability to the theory of our defense, will demonstrate its materiality, at least sufficiently so to merit a discussion of same.

IV.

Assignment 48—Error in Failing to Instruct Upon Our Theory of Defense

As pointed out in our argument and brief, the trial court gave an instruction upon the government's theory of the case, but refused to give an instruction requested by us upon our theory of defense.

We assumed that there could be no question concerning the merits of this point, and that the case of Calderon vs. U. S., 279 Fed. 556, cited in the brief, would be controlling of the question.

The opinion makes no mention of this assignment, and gives no reason for its rejection, other than the general statement "that an examination of the record satisfies us that the case was clearly and fairly submitted to the jury."

We respectfully submit that in view of our authority supporting our position on this question,

that we are justified in the belief that it was worthy of consideration and discussion.

CONCLUSION

It is with regret that we are compelled in obedience to our obligations to our client, to differ in so many respects with the opinion of the court, but we find consolation in the thought that perhaps the pressure of business and the great increase in the number of appeals in prohibition cases, have made it practically an impossibility to give a more studied and exhaustive examination of the record, such as we naturally would like to receive. We feel therefore that the court will be the more readily disposed to grant a rehearing if, upon a re-examination of the points herein mentioned, there will be indicated a grave doubt of the correctness or sufficiency of the opinion.

Respectfully submitted,

Barnett H. Goldstein,

Attorney for Plaintiff in Error.

CERTIFICATE OF COUNSEL

I hereby certify that in my judgment the aforegoing petition is well founded, and that it is not interposed for delay.

Barnett H. Goldstein,

Attorney for Plaintiff in Error.

No. 4504

United States
Circuit Court of Appeals
For the Ninth Circuit. 13

BOOTH FISHERIES COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Division Number One.

FILED
MAR 30 1925
F. D. MONCKTON

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4504

United States

Circuit Court of Appeals

For the Ninth Circuit.

BOOTH FISHERIES COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Division Number One.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Page

Assignments of Error........................ 171
Bill of Exceptions.......................... 20
Bond for Stay of Execution.................. 158
Bond on Writ of Error....................... 179
Citation on Writ of Error................... 184
Certificate of Clerk U. S. District Court to Transcript of Record...................... 188

EXHIBITS:

Plaintiff's Exhibit No. 1—Letter Dated February 16, 1924, P. H. McCue to Clerk of U. S. District Court, Division 1, Juneau, Alaska.............. 187

Information—For Violation of Sec. 3 of the Act of Congress Approved June 26, 1906, as Amended by Act of June 6, 1924, and Regulations Thereunder 4

Information—Sec. 4 of Act of Congress Approved June 26, 1906, as Amended by the Act of June 6, 1924, and Regulations Thereunder 1

Instructions of Court to the Jury............ 136

Index. Page

Instructions Requested by Defendant.......... 147
Judge's Certificate to Bill of Exceptions....... 152
Judgment and Sentence........................ 153
Motion for a New Trial........................ 150
Motion for Stay of Execution and for Order Allowing Time Within Which to File Bill of Exceptions 157
Names and Addresses of Attorneys of Record 1
Order Allowing Time to File Bill of Exceptions and Granting Stay of Execution.... 161
Order Allowing Writ of Error and Fixing Supersedeas Bond 178
Order Consolidating for Trial Cases Nos. 1749–B, 1778–B 8
Order Granting Leave to Amend Information—Cause No. 1749–B....................... 13
Order Overruling Motion for New Trial...... 166
Petition for Writ of Error.................... 176
Praecipe for Transcript of Record............ 186
Stipulation and Order Omitting Original Exhibits from Printed Transcript of Record 190

TESTIMONY ON BEHALF OF PLAINTIFF:

BALL, EDWARD M. 21
Cross-examination 35
Redirect Examination 38
Recross-examination 40
Recalled 47
Redirect Examination 47
Recross-examination 47

Index. Page

TESTIMONY ON BEHALF OF PLAINTIFF—Continued:
Redirect Examination 48
Recross-examination 48
Recalled 98
Cross-examination 100
DUNN, JOHN H. 87
HUNTER, EARLE L. 79
KERR, OLE 40
Cross-examination 43
McCUE, ANTHONY 81
Cross-examination 86
Redirect Examination 87
OLSON, JOHN 48
Cross-examination 52
STENSLAND, IVER N. 64
Cross-examination 76
Redirect Examination 78
Recross-examination 79
Recalled 91
Cross-examination 94
Redirect Examination 95
Recross-examination 96
Redirect Examination 98
THUE, IVER 55
Cross-examination 61

Index. Page

TESTIMONY ON BEHALF OF DEFENDANT:
ADAMS, STANLEY 115
Cross-examination 117
HERRALD, A. N. 129
Cross-examination 134
McCUE, ANTHONY 105
Cross-examination 111
SPRAGUE, A. J. 120
Cross-examination 126
Redirect Examination 129
Verdict—Cause No. 1749–B.................. 149
Verdict—Cause No. 1778–B.................. 149
Writ of Error.............................. 182

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Hon. A. G. SHOUP, United States Attorney, Juneau, Alaska,

Attorney for Defendant in Error.

H. L. FAULKNER, Esq., Juneau, Alaska,

Attorney for Plaintiff in Error.

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1749—B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation.

INFORMATION.

Sec. 4 of the Act of Congress Approved June 26, 1906, as Amended by the Act of June 6, 1924, and Regulations Thereunder.

BE IT REMEMBERED that A. G. Shoup, United States Attorney for the First Division, District of Alaska, who for the United States in this behalf prosecutes, in his own proper person comes here into the District Court, of said District and Division, on this —— day of October, 1924, leave of the Court first being had and obtained, and for the United States gives the Court here to

understand and be informed, that the Booth Fisheries Company, a corporation, is now and at all times herein mentioned was, duly organized and existing as a corporation doing business in the Territory of Alaska; said Booth Fisheries Company, a corporation, at or near Lucky Cove, indenting the shore of Revillagigedo Island between Thorn Arm and Behm Canal, in the said District of Alaska, and within the jurisdiction of this Court, on the 26th day of July, 1924, continuously to and including the 20th day of August, 1924, in the waters of Revillegigedo Channel, between Thorn Arm and Behm Canal, the same being waters of Alaska over which the United States has jurisdiction and in Division Number One, District of Alaska, and within the jurisdiction of this Court, did then and there unlawfully fish for and take salmon for commercial purposes and not for local food requirements or for use as dog feed, by means of a fish-trap, known as Booth Fisheries Company's Trap, License No. 24–179, within five hundred yards of the mouth of a small unnamed creek, said creek being then and there a stream into which salmon run, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States of America. [1*]

WHEREUPON said Attorney of the United States, who prosecutes as aforesaid, for the United States, prays the consideration of the Court here in the premises, and that due process of law may be awarded against said Booth Fisheries Com-

---

*Page-number appearing at foot of page of original certified Transcript of Record.

pany, a corporation, in this behalf to make their answer to said United States concerning the premises aforesaid.

A. G. SHOUP,
United States Attorney.

United States of America,
Territory of Alaska,—ss.

A. G. Shoup, being first duly sworn, on oath deposes and says: that he is the United States Attorney for the First Division, District of Alaska; that he has read the foregoing information; knows the contents thereof, and believes the same to be true.

A. G. SHOUP.

Subscribed and sworn to before me this 16th day of October, 1924.

[Court Seal] N. B. COOK,
Deputy Clerk of District Court, District of Alaska,
Division No. 1.

Filed in the District Court, Territory of Alaska, First Division. Oct. 16, 1924. John H. Dunn, Clerk. By N. B. Cook, Deputy. [2]

In the District Court for the District of Alaska, Division Number One, at Juneau.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

INFORMATION.

For Violation of Sec. 3 of the Act of Congress Approved June 26, 1906, as Amended by Act of June 6, 1924, and Regulations Thereunder.

BE IT REMEMBERED, that A. G. Shoup, United States Attorney for the First Division, District of Alaska, who for the United States in this behalf prosecutes, in his own person comes here into the District Court of said Division and District, leave of Court being first had and obtained, and for the United States gives the Court here to understand and be informed that the Booth Fisheries Company, a corporation, is now, and at all times herein mentioned was, duly organized and existing as a corporation doing business in the Territory of Alaska; and that said Booth Fisheries Company, on the 25th day of July, 1924, in the First Division, District of Alaska, in waters over which the United States has jurisdiction, to wit, at or near Lucky Cove, indenting the shore of Revillagigedo Island between Thorn Arm and Behm Canal, in the Waters of Revillagigedo Chan-

nel, within 500 yards of the mouth of a small unnamed creek emptying into Lucky Cove, the said creek being then and there a stream into which salmon run, not for the purpose of fish culture, did wilfully and unlawfully erect and maintain a floating fish-trap known as Booth Fisheries Company's trap, license number 24–179, with the purpose and result of capturing salmon and preventing and impeding their ascent to the spawning grounds in said creek, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America. [3]

COUNT TWO.

And said United States Attorney who prosecutes as aforesaid, in the court aforesaid, further gives the Court to understand and be informed that the Booth Fisheries Company, a corporation, is now, and at all times herein mentioned was, duly organized and existing as a corporation doing business in the Territory of Alaska; and that said Booth Fisheries Company, on the 10th day of September, 1924, in the First Division, District of Alaska, in waters over which the United States has jurisdiction, to wit, at or near Lucky Cove indenting the shores of Revillagigedo Island between Thorn Arm and Behm Canal, in the waters of Revillagigedo Channel, within five hundred yards of the mouth of a small unnamed creek emptying into Lucky Cove the said creek being then and there a stream into which salmon run, not for the purpose of fish culture, did wilfully and unlawfully erect and main-

tain a floating fish-trap known as Booth Fisheries Company's trap, license number 24–179, with the purpose and result of capturing salmon and preventing and impeding their ascent to the spawning grounds in said creek, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

COUNT THREE.

And said United States Attorney, who prosecutes as aforesaid, in the court aforesaid, further gives the Court to understand and be informed that the Booth Fisheries Company, a corporation, is now, and at all times herein mentioned was, duly organized and existing as a corporation doing business in the Territory of Alaska; and that said Booth Fisheries Company, on the 11th day of September, 1924, and continuously to and including the 16th day of September, 1924, in the First Division, District of Alaska, in waters over which the United States has jurisdiction, to wit, at or near Lucky Cove indenting the shores of [4] Revillagigedo Island between Thorn Arm and Behm Canal, in the waters of Revillagigedo Channel, within five hundred yards of the mouth of a small unnamed creek emptying into Lucky Cove, the said creek being then and there a stream into which salmon run, not for the purpose of fish culture, did wilfully and unlawfully erect and maintain a floating fish-trap known as Booth Fisheries Company's trap, license number 24–179, with the purpose and result of capturing salmon and preventing and impeding their ascent

to the spawning grounds in said creek, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE said United States Attorney, who prosecutes as aforesaid, for the United States, prays the consideration of the Court in the premises, and that due process of law may be awarded against said Booth Fisheries Company in this behalf to make their answer to said United States concerning the premises aforesaid.

A. G. SHOUP,
United States Attorney.

United States of America,
Territory of Alaska,—ss.

A. G. Shoup, being first duly sworn, on oath deposes and says that he is the United States Attorney for the First Division, District of Alaska; that he has read the foregoing information, knows the contents thereof and believes the same to be true.

A. G. SHOUP.

Subscribed and sworn to before me this 4th day of December, 1924.

[Court Seal] JOHN H. DUNN,
Clerk of District Court, Dist. of Alaska, Division No. 1.

Filed in the District Court, Territory of Alaska, First Division. Dec. 4, 1924. John H. Dunn, Clerk. By ————, Deputy. [5]

In the District Court for the District of Alaska, Division Number One, at Juneau.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

ORDER CONSOLIDATING FOR TRIAL CASES Nos. 1749-B and 1778-B.

And now, to wit, on December 6, 1924, this matter came before the Court upon the motion of A. G. Shoup, United States Attorney, for an order consolidating for trial cases numbers 1749-B and 1778-B, and the law and the premises being by the Court fully understood and considered. IT IS HEREBY ORDERED that said cases 1749-B and 1778-B. pending in this court, be consolidated for trial.

THOS. M. REED,
District Judge.

Filed in the District Court, Territory of Alaska, First Division. Dec. 6, 1924. John H. Dunn, Clerk. By ————, Deputy.

Entered Court Journal No. One, page 269. [6]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

INDEX TO TESTIMONY.

Page.

TESTIMONY ON BEHALF OF THE PLAINTIFF:

EDWARD M. BALL 16
Cross-examination 28
Redirect Examination 31
Recross-examination 33
Recalled ....–" 40
OLE KERR 33
Cross-examination 36
JOHN OLSON 41
Cross-examination 45
IVER THUE 48
Cross-examination 54
IVER N. STENSLAND 58
Cross-examination 69
Redirect Examination 71
Recross-examination 72

Recalled on Redirect Examination 84
Recross-examination 86
EARLE L. HUNTER 72
ANTHONY McCUE 74
Cross-examination 79
JOHN H. DUNN 81

TESTIMONY ON BEHALF OF THE DEFENDANT:

IVER THUE 94
ANTHONY McCUE 97
Cross-examination 103
STANLEY ADAMS 107
Cross-examination 110
A. J. SPRAGUE 112
Cross-examination 118
Redirect Examination 121
A. N. HERROLD 121
Cross-examination 125

[7]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1749—B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation.

INFORMATION.

Sec. 264 C. L. A., as Amended June 6, 1924, and Regulations Thereunder.

BE IT REMEMBERED that A. G. Shoup, United States Attorney, for the First Division, District of Alaska, who for the United States in this behalf prosecutes in his own proper person comes here into the District Court of Said District and Division, on this —— day of October, 1924, leave of the Court first being had and obtained, and for the United States gives the Court here to understand and be informed, that the Booth Fisheries Company, a corporation, is now and at all times herein mentioned, was duly organized and existing as a corporation, doing business in the Territory of Alaska; said Booth Fisheries Company, a corporation, at or near Lucky Cove, indenting the mainland shore of Alaska, between Thorn Arm and Behm Canal, in the said District of Alaska, and within the jurisdiction of this Court, on the 26th day of July, 1924, continuously to and including the 20th day of August, 1924, in the waters of Revillagigedo Channel, between Thorn Arm and Behm Canal, the same being waters of Alaska over which the United States has jurisdiction and in Division Number One, District of Alaska and within the jurisdiction of this Court, did then and there unlawfully fish for and take salmon for commercial purposes and not for local food requirements or for use as dog feed, by means of a fish-

trap, known as Booth Fisheries Company's trap, license No. 24–179, within five hundred yards of the mouth of a small unnamed creek, said creek being then and there a stream into which salmon run, [8] contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

WHEREUPON said Attorney of the United States, who prosecutes as aforesaid for the United States, prays the consideration of the Court here in the premises, and that due process of law may be awarded against said Booth Fisheries Company, a corporation, in this behalf to make their answer to said United States concerning the premises aforesaid.

A. G. SHOUP,
United States Attorney.

United States of America,
Territory of Alaska,—ss.

A. G. Shoup, being first duly sworn, on oath deposes and says: That he is the United States Attorney for the First Division, District of Alaska; that he has read the foregoing information; knows the contents thereof, and believes the same to be true.

A. G. SHOUP.

Subscribed and sworn to before me this 16th day of October, 1924.

[Seal] N. B. COOK,
Deputy Clerk of District Court, District of Alaska, Division No. ——.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division. October 16, 1924. John H. Dunn, Clerk. By N. B. Cook, Deputy.

Thereafter, to wit, on December 6, 1924, on motion of United States Attorney A. G. Shoup, dated December 4, 1924, for leave to amend the information theretofore filed in cause No. 1749–B, the Court entered an order granting said motion, which order is, in words and figures, as follows, to wit: [9]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1749–B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY.

ORDER GRANTING LEAVE TO AMEND INFORMATION.

And now, to wit, on December 6, 1924, this matter came before the Court upon the motion of A. G. Shoup, United States Attorney, for leave to amend the information heretofore, to wit, on October 16, 1924, filed in the above-entitled court and cause, and the law and the premises by the Court being fully understood and considered, IT IS HEREBY ORDERED that said information be amended by interlineation, as follows:

1. By writing after the word "information"

in the caption of said information the words "Sec. 4 of the Act of Congress approved June 26, 1906, as amended by the act of June 6, 1924, and regulations thereunder," in place of the words "Sec. 264, C. L. A., as amended June 6, 1924, and regulations thereunder."

2. By striking out the words "mainland shore of Alaska," in the eleventh line of page one of said information, and writing in place thereof the words, "shore of Revillagigedo Island."

THOS. M. REED,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division. Dec. 6, 1924. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. One, page 269.

And thereafter, to wit, on December 6, 1924, on motion of the United States Attorney, A. G. Shoup, made Dec. 4, 1924, the Court entered an order consolidating for trial causes Nos. 1749–B and 1778–B, which order, in words and figures, is as follows, to wit:

In the District Court for the District of Alaska, Division Number One, at Juneau. [10]

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

ORDER CONSOLIDATING FOR TRIAL CASES Nos. 1749–B and 1778–B.

And now, to wit, on December 6, 1924, this matter came before the court upon the motion of A. G. Shoup, United States Attorney, for an order consolidating for trial cases, numbers 1749–B and 1778–B, and the law and the premises being by the Court fully understood and considered, IT IS HEREBY ORDERED that said cases 1749–B and 1778–B, pending in this court, be consolidated for trial.

THOS. M. REED,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division. Dec. 6, 1924. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. One, page 269.

In the District Court for the District of Alaska, Division Number One, at Juneau.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

INFORMATION.

For Violation of Sec. 3 of the Act of Congress Approved June 26, 1906, as Amended by Act of June 6, 1924, and Regulations Thereunder.

BE IT REMEMBERED, that A. G. Shoup, United States Attorney for the First Division, District of Alaska, who for the United States in this behalf prosecutes, in his own person comes here into the District Court of said Division and District, leave of Court being first had and obtained, and for the United States gives the Court here to understand and be informed that the [11] Booth Fisheries Company, on the 25th day of July, and at all times herein mentioned was, duly organized and existing as a corporation doing business in the Territory of Alaska; and that said Booth Fisheries Company, on the 25th day of July, 1924, in the First Division, District of Alaska, in waters over which the United States has jurisdiction, to wit, at or near Lucky Cove, indenting the shore of Revillagigedo Island, between Thorn Arm and Behm Canal, in the waters of Revillagigedo Channel, within 500 yards of the mouth of a small unnamed creek emptying into Lucky Cove, the said creek being then and there a stream into which salmon run, not for the purpose of fish culture, did wilfully and unlawfully erect and maintain a floating fish-trap known as Booth Fisheries Company's trap, license number 24–179, with the purpose and result of capturing salmon and preventing and impeding their ascent to the spawn-

ing grounds in said creek, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

COUNT TWO.

And said United States Attorney who prosecutes as aforesaid, in the court aforesaid, further gives the Court to undestand and be informed that the Booth Fisheries Company, a corporation, is now, and at all times herein mentioned was, duly organized and existing as a corporation, doing business in the Territory of Alaska; and that said Booth Fisheries Company, on the 10th day of September, 1924, in the First Division, District of Alaska, in waters over which the United States has jurisdiction, to wit, at or near Lucky Cove, indenting the shores of Revillagigedo Island between Thorn Arm and Behm Canal, in the waters of Revillagigedo [12] Channel, within five hundred yards of the mouth of a small unnamed creek emptying into Lucky Cove, the said creek being then and there a stream into which salmon run, not for the purpose of fish culture, did wilfully and unlawfully erect and maintain a floating fish-trap known as Booth Fisheries Company's trap, license number 24–179, with the purpose and result of capturing salmon and preventing and impeding their ascent to the spawning grounds in said creek, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

COUNT THREE.

And said United States Attorney, who prosecutes as aforesaid, in the court aforesaid, further gives the Court to understand and be informed that the Booth Fisheries Company, a corporation, is now, and at all times herein mentioned was, duly organized and existing as a corporation, doing business in the Territory of Alaska; and that said Booth Fisheries Company, on the 11th day of September, 1924, and continuously to and including the 16th day of September, 1924, in the First Division, District of Alaska, in waters over which the United States has jurisdiction, to wit, at or near Lucky Cove, indenting the shores of Revillagigedo Island, between Thorn Arm and Behm Canal, in the waters of Revillagigedo Channel, within five hundred yards of the mouth of a small unnamed creek emptying into Lucky Cove, the said creek being then and there a stream into which salmon run, not for the purpose of fish culture, did wilfully and unlawfully erect and maintain a floating fish-trap known as Booth Fisheries Company's trap, license number 24–179, with the purpose and result of capturing salmon and preventing and impeding [13] their ascent to the spawning grounds in said creek, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE said United States Attorney, who prosecutes as aforesaid, for the United States, prays the consideration of the Court in the prem-

ises, and that due process of law may be awarded against said Booth Fisheries Company in this behalf to make their answer to said United States concerning the premises aforesaid.

A. G. SHOUP,
United States Attorney.

United States of America,
Territory of Alaska,—ss.

A. G. Shoup, being first duly sworn on oath deposes and says that he is the United States Attorney for the First Division, District of Alaska; that he has read the foregoing information, knows the contents thereof and believes the same to be true.

[Seal] A. G. SHOUP.

Subscribed and sworn to before me this 4th day of December, 1924.

JOHN H. DUNN,
Clerk of District Court, District of Alaska, Division No. 1.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division. Dec. 4, 1924. ————, Clerk. By ————, Deputy. [14]

NAMES AND ADDRESSES OF ATTORNEYS.

H. L. FAULKNER, Juneau, Alaska,
Attorney for Plaintiff in Error.

A. G. SHOUP, United States Attorney, and

H. D. STABLER, Special Asst. U. S. Attorney, Juneau, Alaska,
Attorneys for Defendant in Error.

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE BOOTH FISHERIES CO., a Corporation,
Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the ninth day of December, 1924, this cause came on for trial before the above-entitled court and a jury duly impaneled and sworn.

The plaintiff, defendant in error, being represented by A. G. Shoup, United States Attorney, and H. D. Stabler, Special Assistant United States Attorney.

The defendant, plaintiff in error, being represented by its attorney and counsel, H. L. Faulkner.

A jury, having been impaneled, accepted and sworn, opening statement was made to the Court and jury by Mr. H. D. Stabler on behalf of the plaintiff, defendant in error; statement on behalf of the defendant, plaintiff in error, being made by Mr. H. L. Faulkner.

Whereupon the plaintiff, to maintain the issues on its part, introduced the following evidence, to wit: [15]

TESTIMONY OF EDWARD M. BALL, FOR PLAINTIFF.

EDWARD M. BALL, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. SHOUP.)

Q. State your name, please, and your official position.

A. Edward M. Ball, Assistant Agent Alaska Service, Bureau of Fisheries.

Q. How long have you been in your present official position?

A. I have been in this position since April, 1912, and in southeastern Alaska since the summer of 1919.

Q. Are you acquainted with the fish-trap at Lucky Cove, floating trap, territorial license No. 24–179? A. I saw that trap this year.

A. What time did you see that trap?

A. I saw that trap on the 26th of July, 1924.

Q. Now, just where is Lucky Cove situated?

(Testimony of Edward M. Ball.)

A. Lucky Cove is about fifteen miles south of Ketchikan, on the south shore of Revillagigedo Island, between Thorn Arm and Behm Canal.

Q. In the First Division, Territory of Alaska?

A. Yes, sir.

Q. Do you know to whom or to what corporation the territorial license was issued for the operation of that trap?

A. I saw the records in the office of the territorial treasurer and I saw a sign on the trap, showing that this license was issued and held by the Booth Fisheries Company.

Q. What was the sign on the trap, Mr. Ball?

A. Booth Fisheries Company in large letters and the license number—24-179. I think the number of the trap, that is, [16] the company's number of the trap, was also on this board, and the distinctive name—Lucky Cove, Lucky Cove No. 3—I think was also on that sign and probably, in smaller letters was the name of the Northwestern Fisheries Company.

Q. Does the fisheries law require the name of the trap and the operator of each trap to be posted on the trap?

A. It does. A regulation requires that.

Q. There is a regulation? A. Yes.

Q. Do you know whether that is also required by the Bureau of Navigation?

A. I'm not sure whether they have a regulation which requires the number or permit to be displayed on the trap.

(Testimony of Edward M. Ball.)

Q. Just what does your regulation require with respect to the name of the actual owner and operator of the trap being placed on it?

A. That the trap shall carry a sign, in letters of six inches in length, either on a white background or white letters on a black background, showing the name of the owner of the trap, and that it shall be displayed in a conspicuous place on the trap.

Q. Do you know by whom this trap was operated in the year 1924?

A. It was operated by the Booth Fisheries Company for the Quadra cannery.

Q. The Quadra cannery belongs to the Booth Fisheries?

A. It does—name on the cannery; big sign on the front of the cannery, I think—Northwestern Fisheries Company, and, in smaller letters, Booth Fisheries Company, owners.

Q. I call your attention to United States Coast and Geodetic Survey chart No. 8075, being a chart of Revillagigedo Channel, in the Territory of Alaska, and I will ask you to [17] point out to the jury on that chart to which I have called your attention, the location of Lucky Cove and the Lucky Cove trap.

A. The Lucky Cove trap—Well, Lucky Cove is this small indentation right here (pointing). No name on this chart.

Q. In what waters?

A. In the waters of Revillagigedo Channel.

Q. And on what land?

(Testimony of Edward M. Ball.)

A. Revillagigedo Island.

Q. Between what bodies of water?

A. Thorn Arm and Behm Canal.

Q. Now, I will hand you here a chart and ask you to identify that, if you can. A. Yes, sir.

Q. What does this represent?

A. It represents a drawing that I made of Lucky Cove.

Q. Showing the trap to which I have referred and to which you have testified? A. Yes, sir.

Q. And the location of it? A. Yes, sir.

Q. And the stream? A. Yes, sir.

Q. Is that a correct drawing of Lucky Cove?

A. It is approximately correct. It wasn't made from any survey—just a sketch. It is the best map of Lucky Cove, I know of, however.

Mr. SHOUP.—If the Court please, we'll offer this drawing for the purpose of illustration.

The COURT.—Any objections? [18]

Mr. FAULKNER.—No, sir; I don't think so.

The COURT.—For the purpose of illustration only?

Mr. SHOUP.—Yes, sir.

The COURT.—It may be received.

(Whereupon said drawing was received and marked Plaintiff's Exhibit No. 1 for the purpose of illustration.)

Q. Now, Mr. Ball, I will ask you to point out to the jury the location of the trap.

A. This heavy straight line represents the position of the trap.

(Testimony of Edward M. Ball.)

Q. Now, the position of the stream.

A. This is the stream. This is the shore at high water. This dotted line through here is the water line at mean low tide and that's the stream up there (pointing).

Q. Go ahead.

A. These are islands at high water only and the faint line represents 1500 feet, taken from that point.

Q. How is that?

A. I say, this faint line here represents 1500 feet, or 500 yards from that point (pointing).

Q. Now, "that point," what do you mean by "that point"?

A. Which we have used as the mouth of the stream at mean low water.

Q. On which side of the stream?

A. It's on the—on the north bank.

Q. At mean low tide? A. At mean low tide.

Q. Have you measured the distance from the trap to the mouth of the stream?

A. I made two measurements from the end of the lead over here to the creek. [19]

Q. At what point on the creek, Mr. Ball?

A. The first measurement was made at about half tide and in coming along the shore, we made an angle about, just about at this point, and our line came across here (pointing); this then being covered with water.

Q. Yes.

A. The distance from this point to the lead—we

(Testimony of Edward M. Ball.)

tied the line to the lead—was twelve hundred and eight feet. That measurement was made on the 26th of July.

Q. Now, where was the point on the stream to which you made your measurements with reference to the tide at that time?

A. It was about midway between the mouth of the creek as it would be at high water, and the mouth at low water.

Q. I don't know whether I asked you, about where was the tide at that time?

A. Oh, it was about half tide. I think the tide was flooding.

Q. Was the tide line at that time the place—

A. (Interposing.) Yes; we measured at the tide line then.

Q. Now, at that particular time, that was the mouth of the stream (pointing)? A. Yes.

Q. Now what is the distance from there to there?

A. Twelve hundred and eight feet.

Q. How did you make that measurement, Mr. Ball?

A. We measured that with a line, a pretty fair-sized line, about the size of a 10-penny nail.

Q. Did you measure it by hand? How long was the line?

A. This line was used in measuring another trap of the Northwestern Fisheries Company, over at Staney Creek. The line was prepared by the Northwestern Fisheries Company and it [20] had knots supposedly at each hundred-foot point in that

(Testimony of Edward M. Ball.)

line. Well, it was an unsatisfactory measurement, so later on, I think on the next day—

Q. (Interrupting.) Now, what day was it you made the first measurement?

A. Twenty-sixth of July. On the 27th of July, I believe, we laid this line out on a gravel bar at the mouth of a river in Smeaton Bay and measured it with a steel tape. We stretched it to about the same tautness as we had in this case when the measurement was made, and we found it to be 1206 feet long. I had it marked, a point here, by tying a little piece of wood.

Q. Now, what was the actual distance from the head of the lead to the mouth of the stream when you measured it on July 26, subsequently checked?

A. The tape to this point was 1208.

Q. Now, on your chart there, how far was the trap itself; that is, the pot of the trap to the mouth of the stream at mean low tide?

A. How is that question?

Q. I say, what is the distance indicated on the chart there from the mouth of the stream at mean low tide to the trap itself, to the pot?

A. To the pot?

Q. Yes.

A. Well, I haven't attempted to indicate the position of the pot, because—

Q. (Interrupting.) Well, is it more or less than 1500 feet?

A. Well, I wouldn't be sure of that. This may not have extended beyond this line. But no

(Testimony of Edward M. Ball.)

measurement was made to the [21] lead. It wasn't there on the second visit I made.

Q. You testified a while ago that the circular line shown on the chart there represents a distance of 1500 feet from the mouth of the creek?

A. Yes. That was determined by a scale, using a scale of one inch to one hundred feet. This line is 1500 inches from that point.

Q. How much of that lead can you now say positively is within 1500 feet of the mouth of the stream at mean low tide?

A. How much of the lead of the trap?

Q. Yes.

A. I should think all the lead, because it was when it was measured—the permit in the War Department Office shows that this trap has a lead of 600 feet.

Q. Mr. Ball, have you seen the official drawing of the survey on which the War Department permit for this trap was issued? A. Yes; I saw it.

Q. Have you a copy of it?

A. I made a tracing of it. I think I gave it to you.

Q. You made an exact tracing of it? A. Yes.

Q. I'll hand you this tracing and ask you if this is an exact tracing made by you of the War Department survey? A. Yes.

Q. On which the permit for this trap was issued?

A. This is a tracing of a map filed by the Northwestern Fisheries Company and on which the permit was issued.

(Testimony of Edward M. Ball.)

Mr. SHOUP.—We offer it in evidence.

Mr. FAULKNER.—We have no objection.

The COURT.—It may be received and marked. [22]

(Whereupon a pencil tracing was received in evidence and marked Plaintiff's Exhibit No. 2.)

Q. Now, Mr. Ball, I will ask you if you visited this trap again this year after you made the measurement on the 26th of July? A. Yes.

Q. What date? A. November 24, 1924.

Q. Did you make any measurement at that time?

A. I did.

Q. Now, will you kindly indicate again on the map as to where you made your measurements on November 24.

A. On the 24th of November we made a measurement from a point twenty-five feet from a cedar tree which is on the shore at that point and to which the lead of this trap was fastened.

Q. Was the trap in at that time?

A. No. At the time of our first visit we measured it along as straight a line as we could. From that point in July where the lead was, to this point, is 600 feet. From that point (pointing) to this is 378, making a total of 978 feet.

Q. What point on the creek was it that you measured from?

A. From the bank of the stream at low water on the north side.

Q. Now, the distance from the head of the lead of

(Testimony of Edward M. Ball.)

the trap to the mouth of the stream at mean low tide was how far?

A. 978 feet, following the meander of this line. In a direct line it would probably have been a little less.

Q. I will also ask you—

A. (Interrupting.) We also made another measurement—

Q. (Interrupting.) Sir? [23]

A. We also made another measurement.

Q. When was that? A. Last visit.

Q. When was that, Mr. Ball?

A. On the 24th of November. We measured from this point.

Q. What point do you mean by "this point"—for the record? A. High-water mark of the creek.

Q. Yes.

A. Along this direction, to the same point, was 1590 feet.

Q. 1590 feet from the head of the lead on the trap to the mouth of the creek at high water? A. Yes.

Q. Mr. Ball, I will ask you to take a pencil and mark on the chart the point to which you measured at mean low tide when you found it nine hundred and some feet. A. On the bank?

Q. On the bank; yes, sir. Just mark that with the letter A.

(Witness does so.)

Q. Is that the place where salt water meets fresh water at mean low tide?

A. As near as we can determine, that's the point.

(Testimony of Edward M. Ball.)

Q. Now, will you mark with the letter B the point from which you took your measurement on the lead on November 24th. A. Here (pointing).

Q. Now, from B to A is how many feet?

A. 978.

Q. I will ask you to make a line along the course that you measured there between B and A and then mark the distance you found it to be.

(Witness does so.) [24]

Q. Put the date there, please. Now, Mr. Ball, if you will mark with the letter C the point from which you took your measurement at high tide on November 24th on the creek.

A. As near as I can tell, it was about here (indicating).

Q. That is on November 24th? A. Yes.

Q. Was that at high water?

A. No; half tide. This (indicating) was then covered with water.

The COURT.—Well, that was on July 26th, wasn't it?

The WITNESS.—July 26th.

The COURT.—He asked you about November 24th.

Q. On November 24th, at high-tide line.

A. Oh, up here? Yes.

Q. Mark that C.

(Witness does so.)

Q. Now, if you will make a line from B to C, showing the course on which that measurement was taken.

(Testimony of Edward M. Ball.)

A. That is the same as the other. They follow the same line.

Q. Now, mark on the chart the distance between B and C as shown by your measurement on November 24, 1924. A. 1592.

Q. And also mark with the letter D the point on the creek to which you made your measurement on July 26th.

(Witness does so.)

Q. Now, mark—make a line from B to D, showing the distance.

(Witness does so.)

Q. What is the distance? A. 1208.

Q. Now, Mr. Ball, where is the point marked there with reference [25] to the mouth of the creek at mean low tide?

A. What do you wish me to—?

Q. For the sake of the record.

A. It's on the—it's on the water's edge, where fresh water meets salt water, from the north side of the stream.

Q. Well, where is the—

The COURT.—(Interrupting.) At what tide?

Q. At what tide?

A. At mean low tide as near as we could tell when mean low tide was on that date.

Q. Where is the mouth of that stream at mean low tide with reference to your mark, the letter A, there?

A. The mouth of the stream is directly at that point.

(Testimony of Edward M. Ball.)

Q. Where is the mouth of the stream at half tide with reference to the letter D?

A. Approximately at the point where the letter D appears on this sketch.

Q. Where is the mouth of the stream at high water with reference to the letter C?

A. At the point where the stream breaks through the woods, as indicated here by the letter C.

Q. Mr. Ball, do you know the length of that lead?

A. No; I didn't make any measurement of the lead.

Q. What would the length be, as shown by the survey of the War Department, upon which this permit was issued?

A. 600 feet. It says here "Length 600 feet long." That's on their map filed down here in Mr. Skinner's office.

Q. Who was present with you when you made the measurements in July?

A. Mr. O'Malley, the Commissioner of Fisheries, Mr. J. J. [26] Reynolds and Lawrence W. Ragan, who is an employee of ours.

Q. Who was there when you made the measurement on November 24th?

A. I was assisted that day by Captain Hunter, Captain Stensland from one of our boats, and Lawrence Ragan.

Q. Who, if anyone, assisted you in measuring that stream on July 27th?

A. July 27th I wasn't there.

Q. You testified that you stretched the string with

(Testimony of Edward M. Ball.)

which the measurement was made on July 26th, on the beach and measured it with a steel tape.

A. That was with Mr. O'Malley, Reynolds and Ragan.

Q. Mr. Ball, why did you make that contour in your measurements, the meander in your measurement from point C, at the mouth of the creek at mean low tide, instead of measuring straight across?

A. Because there was water there that I couldn't wade. It was too deep and we couldn't stretch this line straight from the lead to the nearest point on the creek.

Q. State whether or not the distance of the measurement would have been any longer or shorter if you had been able to measure it directly across without making that—

A. The distance would have been shorter.

Q. How much?

A. Oh, I should judge from thirty to fifty feet.

Q. The distance as you measured it was 981 feet?

A. 978.

Q. 978.

A. There is a considerable angle in that line.

Q. Have you ever examined that stream with reference to its being a salmon stream? [27]

A. The only time I was on the stream was the 24th of November. We saw no fish that day.

Q. That was the 24th of November? A. Yes.

Q. Were fish running in that locality at that

(Testimony of Edward M. Ball.)

time? A. No; I think not. The run was over.

Q. The run was over.

A. And the water was too high and too much discolored by vegetation for us to see. There were a good many bones of fish on the banks where they had been dragged out by bears and birds.

Q. Bones of what kind of fish?

A. Salmon.

Q. How far up the banks did you go, of the creek?

A. Oh, not more than five, six hundred feet from that high-water mouth.

Q. You did find a good many bones of salmon along the banks? A. Yes.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Ball, you didn't examine this stream on the 26th of July?

A. Not above the beach.

Q. Did Mr. O'Malley examine it then?

A. I think not.

Q. Did he examine it at any time this summer?

A. No.

Q. You think he didn't?

A. No; he wasn't there but the one time.

Q. Was there any discussion about there being salmon in the [28] creek at that time?

Mr. SHOUP.—We object to that as immaterial.

Mr. FAULKNER.—Well, I'll withdraw the question.

Q. Mr. Ball, after you made that examination

(Testimony of Edward M. Ball.)

on the 26th of July, you went to the cannery, didn't you, of the—

A. (Interrupting.) We stopped that night at Roe Point. The cannery at Roe Point was not operating. We saw Mr. P. H. McCue that same evening.

Q. That's the manager? A. Yes.

Q. And you talked to him about the trap?

A. Yes.

Q. And you told him at that time, either you or Mr. O'Malley, about some trouble that Mr. Paul was trying to make?

Mr. STABLER.—Oh, we object to that as not proper cross-examination.

The COURT.—I'll sustain the objection.

Q. Mr. Ball, did you at that time tell him you measured the distance?

A. I think we did; yes.

Q. Did you make any complaint to him or order him to take his trap out? A. No.

Q. Did you at any time subsequent to that?

Mr. SHOUP.—How is that?

Q. Did you at any time after that?

Mr. SHOUP.—Oh, we object to that as immaterial.

The COURT.—He may answer.

A. No, sir; we did not tell him at any time to remove the trap.

Q. Now, Mr. O'Malley was at the cannery on the ninth of September, wasn't he? [29]

(Testimony of Edward M. Ball.)

A. I know that Mr. O'Malley left Juneau on the eighth of September on a boat for Seattle.

Q. And the boat went in there and stayed several hours loading fish, didn't it?

A. I'm not sure about that.

Q. Now, Mr. Ball, you had come— There has been some little difficulty about determining the mouth of a stream, hasn't there?

A. In some places it has been very hard to determine.

Q. Now, the law now requires, and did require this summer, that the bureau place markers at the mouths of the streams for the purpose of measuring to traps?

Mr. STABLER.—We object to that. Not proper cross-examination, and for the further reason that the law speaks for itself.

The COURT.—He may answer.

Q. Is that so, Mr. Ball?

A. There is a provision in section three of the act of June 6, 1924, which says that the mouth of a stream shall be determined by the Secretary of Commerce and marked in accordance with that determination.

Q. Now, was the mouth of this stream marked at any time? A. Not that I know of.

Q. Hasn't been marked yet. Now, Mr. Ball, you have been with the bureau since 1919.

A. I came down here in summer of 1919.

Q. And you had seen this trap before?

A. No, sir; I was never there before.

(Testimony of Edward M. Ball.)

Q. How is that?

A. I never saw the trap until this year. [30]

Q. Well, you know whether your bureau officials had inspected that trap? A. Well—

Mr. SHOUP.—(Interrupting.) We object to that as immaterial.

Mr. FAULKNER.—We withdraw the question.

The COURT.—Objection overruled.

A. Yes; the trap was examined several times in 1923.

Q. Now was the distance measured before by the bureau?

A. I think Mr. Stensland made one measurement in 1923.

Q. Did you know the result?

A. At high water.

Q. Do you know the result of that?

A. 1506 feet, I think he told me.

Q. 1506 feet. A. Yes.

Mr. FAULKNER.—That's all.

Redirect Examination.

(By Mr. SHOUP.)

Q. Do you know whether or not any other measurements were taken by any other officers of the bureau previous to 1924?

A. No; only the one I just mentioned by Mr. Stensland. I know there was some estimates of the distance.

Q. Did you have any report from any of your officers prior to 1924 that it was too close to the creek? A. Yes.

(Testimony of Edward M. Ball.)

Q. Who was that by?

A. Reported by H. H. Hungerford.

Q. When? A. In September, 1923.

Q. Who is H. H. Hungerford? [31]

A. He was a warden in our service.

Q. What did he report?

A. He reported that the trap—

Mr. FAULKNER.—(Interrupting.) If the Court please, I think that this is not the best evidence, and I'll object to it on that ground.

Mr. SHOUP.—Well, counsel brought that subject up himself.

Mr. FAULKNER.—Well, I just asked him if he ever made any measurements before.

The COURT.—Yes; he simply asked him if there were any measurements made of the trap before. Objection sustained.

Q. Were there any measurements reported at low water from the mouth of this creek at mean low tide in 1923? A. None.

Q. And the measurement at high water, reported—

A. (Interposing.) Was 1506, following the meander of the shore.

Q. Following the meander line of the shore?

A. Uh-huh.

Q. Mr. Ball, Mr. Faulkner asked you about the provisions of the law with relation to markers at the mouths of streams. You testified, I believe, that there is a provision in section 3 of that law?

A. Yes.

(Testimony of Edward M. Ball.)

Q. Is there any provision relating to markers in section 4 of the law? A. None.

Q. To what does section 4 relate?

A. Relates to the taking and fishing for salmon within 500 yards of the mouth of any stream, by any means. [32]

Mr. SHOUP.—That's all.

Recross-examination.

(By Mr. FAULKNER.)

Mr. FAULKNER.—There is one other question I wanted to ask Mr. Ball on cross-examination.

Q. Mr. Ball, you say the license for this trap was issued to the Booth Fisheries Company. Now, did you get the date?

A. No; I couldn't tell you the date.

Mr. FAULKNER.—That's all.

TESTIMONY OF OLE KERR, FOR PLAINTIFF.

OLE KERR, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. STABLER.)

Q. What is your name? A. Ole Kerr.

Q. Where do you live, Mr. Kerr?

A. Ketchikan.

Q. What are you doing in Ketchikan?

A. Fishing.

Q. How long have you been fishing in Ketchikan?

A. Around 14 years.

(Testimony of Ole Kerr.)

Q. Where have you been working the last four or five years? A. Smiley's cannery.

Q. At Ketchikan? A. Yes.

Q. Where were you working in 1918?

A. For the Northwestern Fisheries.

Q. Where? [33] A. Quadra.

Q. What were you doing?

A. Watching a trap.

Q. What trap? A. Lucky Cove.

Q. Where is that trap which you watched in the year 1918? A. It's in Lucky Cove.

Q. Will you step over here to this map and point out for us where you watched the trap in 1918?

A. Yes, sir.

Q. Now, point out on this Coast and Geoditic Survey Chart No. 8075 of Revillagigedo Channel and Revillagigedo Island and point out the position of that trap that you watched in 1918. This the Revillagigedo Island.

A. Where is that Lucky Cove?

Mr. FAULKNER.—Well, just a minute. Let him point it out.

The WITNESS.—I can't do it until I find out where this—

Q. Point out Lucky Cove.

A. Here (pointing).

Q. Now, where was the trap in 1918 that you were watching?

A. Right there (pointing).

Q. At Lucky Cove? A. Yes.

(Testimony of Ole Kerr.)

Q. Do you know where the creek is in Lucky Cove? A. Yes.

Q. How far was it from your trap, about?

A. I never measured it.

Q. Well, give us an idea of what it was.

A. Oh, around a thousand, twelve hundred feet.

Q. Any other stream close by your trap, emptying into Lucky Cove? [34]

A. Not that I know of.

Q. Now, did you ever go up this stream?

A. Yes.

Q. How far?

A. Oh, just about a hundred feet or two.

Q. What year? A. 1918.

Q. What did you see there when you went up there, up that stream with relation to salmon fish? A. I seen a few fish up there; that's all.

Q. How many, about, did you see?

A. Oh, I don't know—a hundred or two; three, maybe.

Q. How far above high-tide line up that creek did you see salmon fish?

A. Oh, around a hundred feet.

Q. Did you ever go up any farther than a hundred feet? A. No, sir.

Q. Now, what month was this in 1918?

A. In August.

Q. You saw salmon fish that stream in August of 1918? A. Yes, sir.

Q. How many fish?

(Testimony of Ole Kerr.)

A. Oh; I don't know; about a couple of hundred, 300, maybe.

Q. A hundred feet above the high-tide line?

A. Yes.

Q. And you didn't go up any farther?

A. No; I never was up any further.

Q. Is that a salmon stream, Mr. Kerr?

A. I think it is. [35]

Cross-examination.

(By Mr. FAULKNER.)

Q. Did you ever tell anybody about this before?

A. Did I what, sir?

Q. Did you ever tell anybody about this before?

A. I told somebody this morning.

The COURT.—About what?

Mr. FAULKNER.—About salmon being in the stream.

The WITNESS.—No; I never did.

Q. You never told anybody? A. No.

Q. Now, that was in 1918? A. Yes.

Q. And you were working for the Northwestern Fisheries then? A. I was; yes.

Q. How long did you work for them?

A. I worked that season for them; that year.

Q. You operated that trap? A. Yes.

Q. You were watchman on that trap? A. Yes.

Q. Just that one season? A. Yes.

Q. Did you have any trouble with them when the season was over? A. No.

Q. Why didn't you go back to work for them?

(Testimony of Ole Kerr.)

A. Well, that's a funny thing to ask a man. I got a right to go wherever I want to.

Q. But you didn't have any trouble with them?

A. No. [36]

Q. Who was the manager there that year?

A. McCue.

Q. Mr. McCue? A. Yes.

Q. He was the manager of the cannery there?

A. Yes; he's the head man for it.

Q. Who was the manager of the cannery? Who was operating the cannery, superintendent of the cannery?

A. Oscar Olson, I think his name was.

Q. Oscar Olson? A. Yes.

Q. Now, you say that trap was about a thousand or twelve hundred feet from the stream?

A. Yes.

Q. That year.

A. Well, I don't know. It may be a little more; it may be a little less.

Q. You didn't measure it? A. No.

Q. And you were watchman there? A. Yes.

Q. Did you know that you were committing a crime by fishing within 1500 feet of the stream?

A. No; I didn't.

Q. Didn't know that? A. No.

Q. You didn't tell anybody anything about it?

A. No.

Q. How did you come to tell about it now, Mr. Kerr?

(Testimony of Ole Kerr.)

A. Because I was asked in Ketchikan; the fish commissioner asked me. [37]

Q. The fish commissioner asked you. Do you know how he came to ask you? A. What?

Q. Do you know how he came to ask you?

Mr. STABLER.—I object to that.

The COURT.—Yes; it is immaterial.

Mr. FAULKNER.—I'll withdraw that.

Q. Do you know William Paul in Ketchikan?

A. No.

Q. Didn't he talk to you about this case?

Mr. STABLER.—We object to that as irrelevant and immaterial and not proper cross-examination.

The COURT.—He may answer.

Q. You know William Paul of Ketchikan?

A. No.

Q. Now, what did you do this year, Mr. Kerr?

A. I was working at Smiley's cannery.

Q. What did you do there?

A. Watching a trap.

Q. Where? A. Out at Bostwick Inlet.

Q. Now, when you saw the fish in the stream down there in August, 1918, what time of the year was that, the latter part of August or the first part of August?

A. Oh, around the first part of August, I guess.

Q. What kind of fish were they? A. Humps.

Q. What's that? A. Humpies.

Q. You are quite sure of that? [38]

A. Sir?

(Testimony of Ole Kerr.)

Q. You are quite sure of that, are you?

A. Yes.

Q. How high was the stream then?

A. How high?

Q. Yes. A. What do you mean, high water?

A. No; the stream itself?

A. It's pretty hard for me to explain all these things. This is five years ago.

Q. You don't remember very accurately?

A. What is that?

Q. You don't remember very accurately?

A. No.

Q. Now, where were these salmon that you saw? Were they in the tide water that backed up in there or were they in the stream itself?

A. They were in the creek.

Q. In the fresh water? A. Yes.

Q. How deep was the water in the creek?

A. There is never much water in that creek.

Q. What's that?

A. There is never very much water in that creek.

Q. As a matter of fact, a good portion of the time, it's dry, isn't it?

A. Yes; I guess it will go dry at times.

Mr. FAULKNER.—That's all.

Recess until 2 o'clock P. M. [39]

Tuesday, December 9, 1924.

Court met pursuant to recess at 2 P. M.

TESTIMONY OF EDWARD M. BALL, FOR PLAINTIFF (RECALLED).

EDWARD M. BALL, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Redirect Examination.

(By Mr. SHOUP.)

Q. Mr. Ball, did your bureau or any officer of your bureau, at any time receive any communication from William L. Paul, regarding this trap in proximity to this creek? A. No, sir.

Q. Have markers been put on any of the streams in southeastern Alaska under the present law?

Mr. FAULKNER.—Well, if the Court please, I object to that as incompetent, irrelevant and immaterial.

The COURT.—Yes; objection sustained.

Recross-examination.

(By Mr. FAULKNER.)

Q. Mr. Ball, were you present during the conversation between Mr. O'Malley and Mr. P. H. McCue at Roe Point on July 27th? A. Yes, sir.

Q. Regarding this trap? A. Yes.

Q. At that time did Mr. O'Malley tell Mr. McCue that Mr. Paul was trying to stir up trouble for him over this trap?

A. I'm not sure whether he said so about Lucky

(Testimony of Edward M. Ball.)

Cove. There was a trap belonging to this company, however, that Mr. Paul complained about.

Mr. FAULKNER.—That's all.

Redirect Examination.

(By Mr. SHOUP.) [40]

Q. Is that another trap than the trap here?

A. Yes.

Q. Has there been any prosecution started against this company on account of the other trap? A. No, sir.

Recross-examination.

(By Mr. FAULKNER.)

Q. You are not sure about this trap?

A. I'm not sure what Mr. O'Malley said. He may have had something to say about Lucky Cove, and that Mr. Paul was complaining about traps belonging to this company.

Mr. FAULKNER.—That's all.

Redirect Examination.

(By Mr. SHOUP.)

Q. Are you sure that Mr. Paul never filed a complaint regarding this trap? A. I am.

Mr. SHOUP.—That's all.

TESTIMONY OF JOHN OLSON, FOR PLAINTIFF.

JOHN OLSON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

(Testimony of John Olson.)

Direct Examination.

(By Mr. STABLER.)

Q. What is your name? A. John Olson.

Q. Where do you live, Mr. Olson?

A. Ketchikan.

Q. What is you occupation?

A. Fisherman. [41]

Q. Now, I will ask you if you are familiar with what is known as Lucky Cove on Revillagigedo Island in southeastern Alaska? A. Yes.

Q. I'll ask you if you were over there in the year 1923? A. Yes.

Q. What were you doing over there in 1923?

A. I was looking after a trap for the Fidalgo Island Packing Company.

Q. What was your position?

A. Watching the trap.

Q. Where was that trap with reference to Lucky Cove?

A. That is just about a mile, little better than a mile south of Lucky Cove.

Q. Where was it with reference to Booth Fisheries trap No. 3? A. I can't hear you.

Q. Where was your trap with reference to Booth Fisheries trap No. 3?

A. Well, that's a matter of a mile, at the point south of Booth Fisheries trap, just around the point.

Q. And Booth Fisheries trap would be between your trap and Lucky Cove?

A. Booth Fisheries trap is right in Lucky Cove.

(Testimony of John Olson.)

Q. Yes. Now, then, what time of the year were you working there as trap watchman in 1923?

A. I came there the 13th of June and I left there the 28th of August.

Q. Are you familiar with the site of the creek emptying into Lucky Cove?

A. Pretty well familiar with it; yes.

Q. Were you up that creek during the months of June, July and [42] August of 1923?

A. I was mostly up there in July; mostly up there every day.

Q. How about August, 1923.

A. Well, I wasn't up there very many times in August. A few times I was up there.

Q. How about the month of June?

A. Well, June I was up there; let's see—it was the latter part of June.

Q. Now, did you go up that creek above the high-tide line?

A. I did went up there, yes, a few times.

Q. Did you see any fish up there?

A. I saw quite a few fish up there.

Q. What kind of fish?

A. Humpback and a few dogs, and out in the bay I saw a very few sockeyes, very few.

Q. All salmon? A. All salmon; yes.

Q. Now, what months of 1923 did you see fish in this creek? A. In July.

Q. Above high-tide line?

A. In July; latter part of July.

Q. How far up did you go above high-tide line?

(Testimony of John Olson.)

A. Oh, I went up about a couple of hundred feet.

Q. How far?

The COURT.—Couple of hundred feet.

Q. And you saw fish up there that far?

A. I saw fish up there; yes.

Q. May there have been fish up there farther than you went up?

Mr. FAULKNER.—Just a minute. I object to that as calling for a conclusion of the witness. [43]

Mr. STABLER.—Well, we think he ought to be permitted to testify to that as far as he knows, from what he saw and could see going up there.

The COURT.—You asked him, "May there have been fish farther up?" I think the question is objectionable. The question is what he saw.

Mr. STABLER.—All right. We'll withdraw it.

Q. Did you see any fish in this stream during the month of August, 1923?

A. I wasn't up the stream at that time.

Q. Is this a salmon stream, this stream emptying into Lucky Cove?

A. That's a salmon stream as far as I can figure it.

Q. Are you familiar with the site of Booth Fisheries Floating trap No. 3 at Lucky Cove?

A. Well, that's the same trap, isn't it?

Q. Yes, sir. A. Yes.

Q. Did you see that trap in the year 1924?

A. I seen it; yes.

(Testimony of John Olson.)

Q. When?

A. Passing—I couldn't say exactly when, but I seen it passing there, going up and down the coast.

Q. What months?

A. In July and the first part of August.

Q. Did you see it in June of this year?

A. I saw it in June this year; yes.

Q. Was that trap fishing in June?

A. She was fishing in June when I passed it.

Q. Sir? [44]

A. She was fishing the latter part of June.

Q. Was it fishing in July of 1924?

A. She was fishing then.

Q. Wes she fishing in August, 1924?

A. Well, now, I couldn't say, in August, whether she was fishing in August or not.

Q. How big is this stream?

A. Oh, that's a good-sized stream. When it's raining a little she's way higher than usually, but in dry weather there's plenty of water enough for fish to go up. It isn't dry. Fish will go up anyway.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Olson, the trap was fishing in June of this year? A. Yes, sir.

Q. And July of this year? A. Yes.

Q. You are quite sure of that?

A. She was fishing; yes.

Q. Now, you're a fisherman, are you?

A. Yes.

(Testimony of John Olson.)

Q. Seine fisherman? A. Seine fisherman.

Q. Did you ever fish down in Lucky Cove?

A. No.

Q. What is that? A. No.

Q. Never fished in there? A. No. [45]

Q. Now, you saw sockeyes in there?

A. No—I saw sockeyes there, yes; but I never fished out there.

Q. What's that?

A. I didn't fish there, but I saw sockeyes there.

Q. What were the fish you saw in the creek?

A. Humpback and dogs.

Q. What time of the year was that?

A. That was in July.

Q. In 1923? A. Yes.

Q. Now, the trap was there then?

A. The trap was there then.

Q. Fishing? A. Yes.

Q. And you didn't complain to anybody about that? A. No; I had no occasion to complain.

Q. You knew that was a salmon stream then?

A. I knew it was a salmon stream; yes.

Q. Now, Mr. Olson, were you ever employed by the Northwestern Fisheries Co.? A. No.

Q. The Booth Fisheries? A. No.

Q. You don't like them very well, do you?

Mr. STABLER.—Oh, we object to that. That's not a material matter in this case.

A. Any man is just as good to me as another so long as I do the right thing to them and they do the right thing by me. [46]

(Testimony of John Olson.)

Q. You know Mr. Thue, Iver Thue? A. No.

Q. You don't? A. No.

Q. Did you have a conversation with a man up here in the hall this morning, named Iver Thue?

A. I spoke with a man, yes; but I don't know his name.

Q. Did you, out in the hall of the courthouse, this morning, tell Mr. Thue—

Mr. STABLER.—Now, just a moment. We object to that for several reasons. In the first place, he hasn't identified this man with Mr. Thue, and I assume that he is trying to impeach the witness, and, if so, we want to know who all was present.

Mr. FAULKNER.—Nobody else present.

The COURT.—You may form your question.

Q. In a conversation with Mr. Thue, didn't you tell Mr. Thue out here in the hall this morning that you hoped the Booth Fisheries Company would get it in the neck in this case?

A. I did not.

Q. You're quite sure of that?

A. Yes; I'm quite sure of that.

Q. What is the name of your boat?

A. "Leona."

Q. "Leona"? A. Yes.

Q. You never fished down there? A. What?

Q. You never fished down there in Lucky Cove?

A. No. [47]

Q. You know Mr. Paul, in Ketchikan?

(Testimony of John Olson.)

A. I. don't. I heard of him, but I don't know the man if I seen him on the street.

Q. You don't know him? A. No.

Mr. FAULKNER.—That's all.

TESTIMONY OF IVER THUE, FOR PLAINTIFF.

IVER THUE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. STABLER.)

Q. What is your name? A. Iver Thue.

Q. Where do you live? A. Ketchikan.

Q. What is your occupation? A. Laborer.

Q. What kind of laboring do you do?

A. Fixing up trap gear and hanging traps, and such as that.

Q. For what company do you hang trap gear?

A. Northwestern Fisheries.

Q. How is that?

The COURT.—Northwestern Fisheries.

Q. Where is their cannery? A. Quadra.

Q. What years were you employed by this cannery as outside foreman?

A. 1920 and this year, 1924.

Q. Are you familiar with the site of the Booth Fisheries trap No. 3 at Lucky Cove? [48]

A. Yes.

Q. Did you have anything to do with putting that trap there? A. Yes.

(Testimony of Iver Thue.)

Q. This year? A. Yes.

Q. When was that trap put in that position, Mr. Thue?

A. As near as I can remember, it was the latter part of June or the first of July; somewheres around there. I never kept any record, but that's as near as I can remember.

Q. 1924? A. Yes.

Q. And you put it in there? A. Yes.

Q. When was that trap first put into fishing condition in 1924?

A. I don't remember just what day, but as near as I can remember, the last part of June or the first part of July; somewheres around there as near as I can remember.

Q. Now, can you say that it was fishing on July first?

A. Not for sure. Maybe it was, but I wouldn't say for sure.

Q. Now, I will ask you if the trap was in a fishing condition on the 26th day of July, 1924?

A. 26th of July?

Q. Yes, sir. A. Yes.

Q. It was fishing then? A. Yes.

Q. How long did that trap remain there after July 26th, 1924, and continue to fish?

A. Till August 19th. [49]

Q. 1924? A. Yes.

Q. Then what happened with reference to the trap? A. We cut the gear off.

(Testimony of Iver Thue.)

Q. Did any—did you do anything else besides cut the gear off? A. No.

Q. Is the trap still there? A. Yes.

Q. Now, was the trap fishing on the 24th of July, 1924? A. Yes.

Q. How long prior to the 24th of July, 1924, would you say that the trap had been fishing?

A. She was not in fishing condition from the 12th, or about the 12th, to the 22d.

Q. Why not?

A. There was big holes in the lead, all the way from twenty feet to forty feet.

Q. From the 12th of July until the 22d of July?

A. Yes, sir.

Q. But outside of those days the trap fished from the first of July, as near as you know, until the end of the close season on the 19th day of August, is that correct? A. Yes.

Q. Now, during those days that the trap had a hole in the lead, was there not some fish getting into the trap?

Mr. FAULKNER.—What was that? I didn't understand the question.

The COURT.—He asked him if on the days there were holes in the lead, some fish were not getting into the trap.

Q. But the trap was not fishing to capacity by reason of these [50] holes in the lead?

A. Yes.

Q. That is what you mean, is it not? A. Yes.

Q. But it was fishing, was it not?

(Testimony of Iver Thue.)

A. It was fishing; yes.

Q. Now, did that trap fish there during any other year besides 1924, to your knowledge? A. Yes.

Q. What year? A. 1922.

Q. What was its location? Was it in the same position in 1922 that it was in in 1924?

A. Yes, sir.

Q. Do you know how many fish this trap caught during the year 1924 A. No, sir.

Q. Did you have anything to do with lifting the spiller on that trap as outside foreman?

A. Once in a while I would be there and help to lift.

Q. Did you take any fish out of that spiller during 1924? A. Yes.

Q. How many

A. Oh, one time 4,000, and the other times I don't remember. 4,000, that was the most.

Q. Did you do all the lifting for the Quadra cannery during the year 1924? A. No.

Q. But you do know of one occasion when 4,000 fish were taken out of that trap? [51] A. Yes.

Q. This year? A. Yes.

Q. And on other occasions when lesser numbers of fish were taken out of that trap? A. Yes.

Q. This year. Now, about the 15th of September, 1924, did you have occasion to go into Lucky Cove and up the creek with Mr. Stensland and Mr. Suemala? A. Yes, sir.

Q. Warden of the Bureau of Fisheries?

A. Yes, sir.

(Testimony of Iver Thue.)

Q. What was the occasion for your going up there at that time?

A. The superintendent was sick and couldn't go, so he asked me to take his place.

Q. What was the occasion for your going up this creek at that time? A. I don't know.

Q. In other words, what did you go up that creek for?

A. I don't know what I went there for. I was asked to go there. That was all that—

Q. What did you do when you went up there?

A. We dug around between the rocks and looked for eggs.

Q. Did you find any eggs? A. Yes.

Q. What kind of eggs?

A. Salmon eggs, it looked to me.

Q. Well, do you know salmon eggs when you see them?

A. Well, they were mixed up with some other fish eggs, maybe. I couldn't tell them apart. [52]

Q. Did you find any salmon eggs there?

A. Yes.

Q. Did you see any salmon in there at that time; that is, on the 15th day of September, 1924?

A. Yes.

Q. How many?

A. Well, about between two and three hundred—300, I should judge.

Q. What kind of salmon?

A. Humpies and dogs.

(Testimony of Iver Thue.)

Q. What was the approximate number of salmon there that were humpies?

A. The majority were humpies; about one-third was dogs; about that.

Q. About one-third dogs and two-thirds humpies, is that correct? A. Yes.

Q. Salmon? A. Yes.

Q. How far up this creek did you go above high-tide line?

A. I don't know just how far up the tide goes. The tide backs up the creek a ways, but I don't know just how far.

Q. Well, with reference to the high-tide line on the beach, how far up did you go above that?

A. Seven or eight hundred feet; about 800 feet, I should judge.

Q. Did you see salmon all the way up those seven or eight hundred feet? A. Yes.

Q. Were they spawning? A. Were they what?

Q. Were these salmon spawning?

A. No; I didn't see them spawn. [53]

Q. But you did find salmon spawn there?

A. Found eggs there; fish eggs.

Q. The creek that you are testifying about is the creek emptying into Lucky Cove, near the Booth Fisheries trap No. 2? A. Yes.

Q. Is that right? A. Yes.

Q. On Revillagigedo Island, southern shore?

A. Yes.

Q. You're still working for the Booth Fisheries Company, are you? A. Yes.

(Testimony of Iver Thue.)

Q. Who is the superintendent of the cannery?

A. McCue.

Q. Your immediate employer? A. McCue.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Thue, you say that this gear was taken off this trap on the 19th of August? A. Yes.

Q. What was done with the trap then?

A. She was left there for a couple of days or so till we got a boat and towed it away.

Q. Now, when you told Mr. Stabler that the trap was still there, is that correct?

A. I must have misunderstood him.

Q. What's that?

A. Then I must have misunderstood him.

Q. Now, you don't mean that the trap is still in the same position? [54] A. No, sir.

Q. Where is it now?

A. It's at the head of Quadra Bay.

Q. Now, as a matter of fact— Put away for the winter, wasn't it? A. Yes.

Q. As a matter of fact it was taken away from there on the 20th of August, wasn't it?

A. Either that or the 21st; I don't remember.

Q. Now, you went up the stream with Mr. Stensland on the 15th of September? A. Yes.

Q. How long was that after the fishing season was over? I might ask you another question and withdraw that. After the fishing season was closed on the 19th of August, did you do any more fishing for that cannery?

(Testimony of Iver Thue.)

A. Yes; the other traps was fishing.

Q. What's that?

A. No; we didn't fish after the 20th.

Q. You closed down on the 20th? A. Yes.

Q. Now, you went up the stream with Mr. Stensland then, on the 15th of September? A. Yes.

Q. That would be 26 days after you closed?

A. Something like that.

Q. And you found some fish up there, you said, I think, between two and three hundred?

A. Yes. [55]

Q. Part of them were humpies and part of them dogs? A. Yes.

Q. And you also saw some eggs. Now, where were those eggs?

A. Between the rocks or under the rocks.

Q. What was the condition of the eggs?

A. Most of them was spoiled. They all was kind of spoiled; turned white.

Q. How were they spoiled?

A. They turned white; they were spoiled.

Q. Well, had they been in the water or had they been exposed to the air?

Mr. STABLER.—Well, now, we think that's going pretty far unless he testifies to some facts showing that he is qualified to answer.

The COURT.—Well, he may answer.

Mr. STABLER.—Pretty much of a conclusion, we think.

The COURT.—He can ask him how they were spoiled.

(Testimony of Iver Thue.)

Q. How were they spoiled, if you know?

A. They were dry.

Q. Dry? A. Yes.

Q. Now, what was the condition of the creek at that time with reference to water? Was there much water in it?

A. Well, in places it was a foot and a half to two or three feet in deep places, and in a lot of places it was dry.

Q. Dry? A. Yes.

Q. How far up the creek did you go that day?

A. Around 800 feet, I should judge.

Q. Had you ever been up that creek before? [56]

A. No, sir.

Q. What is the condition of the creek? Is it a sandy bottom or a rocky bottom? A. Rocky.

Q. Mr Thue, how much experience have you had in hanging fish-traps? How many years?

A. About eleven or twelve years.

Q. And you say that you were in the employ of this company in 1922 and 1924, and, did you say 1920? A. Yes.

Q. That's three years? A. Yes, sir.

Q. And you had only been up the stream once?

A. Yes.

Q. Now, did you know the position of that trap during those three years?

Mr. SHOUP.—We object to that as not proper cross-examination.

Mr. FAULKNER.—I think it is. I think they asked him if that trap was there in 1922. I may

(Testimony of Iver Thue.)

be mistaken, but I think that Mr. Stabler asked him that question.

The COURT.—I think he did. You may ask him.

Q. Was the trap in the same place in 1922 that it was in 1924? A. Yes, sir.

Q. Was it in the same place in 1920?

A. I don't know. I didn't see the trap there.

Q. Oh, you didn't see the trap. Well, now, how do you know that it was in the same place in 1922 that it was in 1924? A. Yes, sir.

Q. I say, you know that? [57] A. Yes, sir.

Mr. FAULKNER.—I think that's all.

TESTIMONY OF IVER N. STENSLAND, FOR PLAINTIFF.

IVER N. STENSLAND, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. STABLER.)

Q. What is your name? A. Iver N. Stensland.

Q. What is your position, Mr. Stensland?

A. I'm master of the patrol boat, Bureau of Fisheries, "Petrel."

Q. How long have you been in such employ?

A. Since April, 1923.

Q. Now, are you familiar with the site of the stream emptying into Lucky Cove? A. Yes, sir.

Q. Now, I will ask you to step over to this map which is in evidence for the purpose of illustration,

(Testimony of Iver N. Stensland.)
and point out the stream, the location of the stream you have reference to, on chart No. 8075.

A. This is Lucky Cove right there.

Q. Where is the stream?

A. This is the stream—this indentation running right in the center of the cove.

Q. What island is that cove on?

A. That's on Revillagigedo Island.

Q. What are the waters surrounding that cove?

A. This is Annette Island, this island here, and this is Revillagigedo Channel, and this is Behm Canal going up here, and on this side is Thorn Arm.
[58]

Q. Now, then, turn to this map here. Turn to the Government's Exhibit No. 1, a map illustrating, introduced for the purpose of illustration, and point out the stream emptying into Lucky Cove.

A. This is the stream here, coming out of the woods and emptying into Lucky Cove.

Q. Now, where is Booth Fisheries floating trap No. 3 with reference to that stream?

A. This is Booth Fisheries trap marked out this way.

Q. Now, what part of the trap is that where it is marked B? A. B.

Q. What part of the trap is that?

A. That is the shore end of the lead, where it is fastened to a cedar tree.

Q. Now, point out there on that exhibit, Mr. Stensland, where the tide comes at high tide, the boundary mark at high tide.

(Testimony of Iver N. Stensland.)

The COURT.—What place?

The WITNESS.—Lucky Cove.

The COURT.—In the Cove?

The WITNESS.—Yes, sir. The high tide covers these flats on both sides of the creek up to here (pointing). This is the high land, grass and timber, along this line here.

Q. Now, point out on that map the meander line of low tide; that is, mean low tide.

A. The meander line of mean low tide is this shaded line, this line outside of the shaded area. There is a gravel bar there and it goes dry right at the mouth of the stream at mean low tide; the low water line goes along past here. Hence it is quite rocky along close to that, around the end of the lead of the trap, rocky soil, and this shore here is a shallow gravel flat. [59]

Q. Now, I will ask you, Mr. Stensland, if you were up in Lucky Cove in and around the territory which you have just explained this summer during the months of July, August and September?

A. Yes, sir.

Q. Now, I will ask you if you had occasion to make any measurements in that cove this summer?

A. I did.

Q. Now, what measurements did you make there, Mr. Stensland?

A. I measured it with Mr. Ball and Captain Hunter and Ragan and myself—measured from the end of the lead here to a point of the north side

(Testimony of Iver N. Stensland.)

of the mouth of the creek, right at the mouth of the creek.

Q. Now, on that map there, marked A, what does that A designate if you know?

A. That designates the mouth of the stream at mean low tide.

Q. Now, what is the position of salt water and fresh water at that particular point?

A. Right there at that point is where the fresh water of the stream enters salt water.

Q. At mean low tide?

A. At mean low tide.

Q. Now what is the distance that you determined from point B to point A on that map?

A. 978 feet.

Q. How was that measured?

A. That's measured—well, the nearest point, twenty-five feet out on the lead from where the lead is fastened to the cedar tree.

Q. Lead of what? [60]

A. Lead of the trap.

Q. Point out about where you started.

A. This is the cedar tree on the bank above high water that the trap lead is fastened to.

Q. And where did you start?

A. And we started twenty-five feet out on the beach.

Q. Now, follow your course.

A. (Continuing.) From that tree, and that gives us a line that cleared this timber line up here straight out to a point here where the low-water line

(Testimony of Iver N. Stensland.)
had a bend in it up towards the shore, so that we measured 600 feet to the extreme point of this bend and then took a slight angle and we got a straight line from there to the mouth of the stream. I had determined the mouth of the stream at low tide and placed some rocks there to sight from. Mr. Ball was sighting the chain with his transit straight out to this point 600 feet and then he set up his transit and we sighted that chain in a straight line to this point at the mouth of the creek, so that we got 378 feet on that line.

Q. Now, Mr. Stensland, what is the distance that you determined from point B, on the lead of that fish-trap, to point A, where fresh water meets salt water at mean low tide in this stream?

A. Along the line that we measured is 978 feet.

Q. Now, did you make any other measurement there at any other time? A. I did.

Q. Point that out.

A. We measured it the same time, the same day we measured to this 600-foot point here and out to this high-water point on the stream. [61]

Q. Did you make any other measurements?

A. I made measurements there last year, the first time I was in there.

Q. When did you make that measurement from point B to point A, Mr. Stensland?

A. That was on the 24th of November.

Q. 1924? A. Yes, sir.

Q. And who was with you?

A. Mr. Ball, Hunter and Mr. Ragan.

(Testimony of Iver N. Stensland.)

Q. Can you tell us on what days you were up in that cove, Lucky Cove this year, Mr. Stensland?

A. I can by looking up my log.

Q. Is that log kept by yourself? A. Yes.

Q. All right. Tell us when you were up in that cove, Mr. Stensland.

A. The first is August tenth.

Q. No; that's 1923, August 10th.

The COURT.—Never mind. You have asked your question. Let him testify.

A. The first time I was in Lucky Cove was July 23d.

The COURT.—What year?

A. This year; 1924.

Q. Now, was that trap fishing, Booth Fisheries trap No. 3, at Lucky Cove, was that trap fishing on the 23d day of July, 1924? A. Yes, sir.

Q. When were you next at that point?

A. I was there the next day on July 24th. [62]

Q. 1924? A. Yes, sir.

Q. Was this Booth Fisheries trap No. 3 fishing at that time? A. Yes, sir.

Q. Now, I will call your attention again to that note you have and ask you when you were next at Lucky Cove?

A. The next time at Lucky Cove was July 31st.

Q. Were you not there the 26th of July?

A. No, sir.

Q. Was the trap fishing on the 31st of July, 1924?

A. Yes, sir.

(Testimony of Iver N. Stensland.)

Q. When next were you at the site of this Booth Fisheries trap No. 3?

A. I was there on August sixth.

Q. Was the trap fishing at that time?

A. Yes, sir.

Q. When next were you at the site of this trap?

A. On August seventh.

Q. Was the trap at that time fishing?

A. Yes, sir.

Q. When next were you at the site of this trap?

A. On September 11th.

Q. Now, did you do anything with reference to the creek at that time; that is to say, on the 11th of September, 1924?

A. On September 11th I went up the creek.

Q. Who went up there with you, if any one?

A. Mr. Suemala went with me.

Q. How far up the creek did you go at that time? A. I judge two miles.

Q. That is, the creek which empties into Lucky Cove? [63] A. Yes, sir.

Q. That you are speaking of now, is that correct?

A. Yes, sir.

Q. Did you make any examination at that time to determine whether there were any salmon running up that creek or not? A. Yes, sir.

Q. What was the result of your examination?

A. I found a considerable number of salmon in that stream at that time.

Q. Did you make any estimate of the number of

(Testimony of Iver N. Stensland.)
salmon you saw in this stream emptying into Lucky Cove on the 11th of September, 1924?

A. I did, sir.

Q. What was your estimate?

A. I estimated in the whole stream that there was about 15,000 fish in the whole stream.

Q. What kind of fish?

A. Humpbacks and dog salmon.

Q. Did you make any estimate to determine the number, the percentage of the fish which were humpies and the percentage of the other kinds of fish?

A. I figured there were eighty per cent humpies and twenty per cent dogs.

Q. Was trap No. 3 fishing at that time?

A. No, sir.

Q. When next were you at the site of this trap after September 11, 1924?

A. Well, I stayed there over night and was there the next morning; left there at nine about on September 12th.

Q. When next were you there at the site of this trap after [64] September 12, 1924?

A. I passed the place on September 14th.

Q. Was this trap fishing at that time?

A. No, sir.

Q. When next were you at this creek in Lucky Cove? A. That's September 15th.

Q. Now, was the trap in at that time?

A. No, sir.

(Testimony of Iver N. Stensland.)

Q. Did you make any examination of the creek at that time? A. Yes, sir.

Q. Was any person with you? A. Yes, sir.

Q. Who? A. Mr. Suemala and Iver Thue.

Q. Who is Mr. Suemala?

A. Mr. Suemala is a warden in the Bureau of Fisheries.

Q. And who is Mr. Thue?

A. Mr. Thue is outside man for the Northwestern Fisheries.

Q. What was your purpose in going up that creek at that time; that is, on September 15, 1924, with Mr. Thue and Mr. Suemala?

A. I had a wire or instructions from Mr. Ball to go down to Lucky Cove and examine that stream and get Mr. McCue to come with me for that purpose to examine the stream in regards to the fish that was in it and fishing conditions.

Q. Well, did you get Mr. McCue?

A. I wired to him from Ketchikan, told him to meet me at Lucky Cove on Monday morning at ten o'clock.

Q. Did he meet you?

A. (Continuing.) Ten-thirty. Mr. Thue met me in his place. [65]

Q. That's the witness who has just testified before you? A. Yes, sir.

Q. Now, what did you do there on the fifth of last September, 1924?

A. We went up the creek a little ways and looked at the salmon that there was in it, and the

(Testimony of Iver N. Stensland.)

river had fell then quite a bit and the gravel bars were bare, some of the bars in the creek were bare, and in these bare bars, why, we dug into the gravel with our hands and dug out quite a number of salmon eggs, and some of them were fertile and some of them were not—just like they ordinarily are in salmon streams.

Q. How far did you go up this stream emptying into Lucky Cove beyond the high-tide line?

A. Oh about a thousand feet or so.

Q. What did you see there? A. Saw salmon.

Q. Did you make any estimate at that time to determine the number of salmon in that stream?

A. I made an estimate that in the distance that we went up there, a thousand feet, I estimated that there was 3,000 salmon in that part of the stream.

Q. Did you take any notice of the kind of salmon? A. Yes, sir.

Q. What kind did you see?

A. Humpbacks and dog salmon.

Q. Did you make any estimate to determine the percentage of humpbacks and dogs?

A. I estimated that it was just about the same that it was the other time I was there—eighty per cent humpies and twenty per cent dogs. [66]

Q. I will ask you if Mr. Thue was with you during all this examination that you made?

A. On this day, yes.

Q. Do you know the number of this floating trap in Lucky Cove? I mean by that the territorial license number.

(Testimony of Iver N. Stensland.)

A. Oh, I don't remember just now.

Q. Did you notice any figure there on that trap?

A. Oh, yes; there was a number there on the trap and the name was on it—Northwestern Fisheries.

Q. Did you see the words Booth Fisheries on there?

A. Yes; there was Booth Fisheries on there, too. All the traps was marked the same way—a license number, a territorial license number and also the number of the trap. It's called Lucky Cove trap.

Q. Whose trap is that?

A. Northwestern Fisheries and Booth Fisheries; all the same concern.

Q. Now, Mr. Stensland, were you up in this stream at any time during 1923? A. Yes, sir.

Q. Give us the dates.

A. I was there on August 10, 1923.

Q. Was this trap in at that time? A. Yes, sir.

Q. Did you see any fish there in that stream?

A. I saw fish in the bay then, in Lucky Cove, but not in the stream.

Q. When next were you at this particular point in 1923?

A. Well, I stayed all night there and left there in the morning of August 11th. [67]

Q. When next did you visit this stream in 1923?

A. On September 13th.

Q. Did you make any observations on the 13th

(Testimony of Iver N. Stensland.)

of September, 1923, to determine whether or not there were any salmon in the stream?

A. Yes, sir; we made an estimate, estimating the salmon in the stream at that time.

Q. How far up the stream did you go there on September 13, 1923?

A. We went up about a mile that time.

Q. Anyone with you?

A. Mr. Hungerford was with me that time.

Q. Did you make any examination to determine whether there were any salmon in the stream at that time or not? A. Yes, sir.

Q. What was the result of your examination?

A. I didn't make any estimate. I didn't put down any estimates. Only I put down that there was quite a number of humpies and dogs in the stream at that time.

Q. You know whether the trap was in there at that time? A. No; the trap was not in then.

Q. Now, were you there at any other time excepting August 10, 1923? That is, August 10 and September 13, 1923. I will ask you if you were there during the month of August, 1923.

A. I was there on August 21st.

Q. Was the trap in at that time?

A. Yes, the trap was in.

Q. Did you see any fish?

A. There was fish in the bay but not in the stream.

Mr. STABLER.—That'll be all. [68]

(Testimony of Iver N. Stensland.)

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Stensland, how long have you been with the Bureau? A. Since April, 1923.

Q. That was last year? A. Yes, sir.

Q. And your headquarters are in Ketchikan?

A. This year they were; yes.

Q. Where were they last year.

A. Well last year during the summer season, they were, too.

Q. You were down in the vicinity of Lucky Cove at that time? A. Yes, sir.

Q. Did you ever see any seine boats down there at that time?

Mr. STABLER.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—I'll hear from you.

Mr. FAULKNER.—I think perhaps it is, your Honor.

The COURT.—Objection sustained.

Q. You went up the stream first, this year, Mr. Stensland, on September tenth, did you say?

A. September 11th.

Q. September 11th. And you saw some fish up there then? A. Yes, sir.

Q. The trap had been taken away, then?

A. Yes, sir.

Q. The cannery was closed down? A. Yes.

Q. Closed down on the 19th of August. Now, what was the condition of the water in the creek at that time? A. On September 11th? [69]

(Testimony of Iver N. Stensland.)

Q. Yes. A. It was quite high.

Q. How was the weather—rainy or fine?

A. The weather was very rainy.

Q. How was it the 15th?

A. The 15th it had quit raining and the water had fell some in the creek.

Q. It was still rather high?

A. Yes, it was just like summer creeks are.

Q. Ever been up that creek at any of the times you have mentioned when the creek was dry?

A. I was there last summer at the very driest spell.

Q. Was it dry then?

A. The dry season, last summer.

Q. Now, in going up the creek, you say you went up the creek two miles?

A. On the 11th of September this year.

Q. What did you find up there two miles?

A. Salmon.

Q. No, I mean with reference to the creek. Was that the end of the creek?

The COURT.—What was that?

Mr. FAULKNER.—Was that the end of the creek? A. Oh, no.

Q. It extended farther up than that?

A. Oh, yes.

Q. What was the condition of the country up there two miles?

A. It was mountainous and the creek was not very swift, but it's got a good stiff current in it; but there's no falls or any cataracts.

(Testimony of Iver N. Stensland.)

Q. Were you there on November 24th of this year? [70] A. Yes, sir.

Q. With Mr. Ball? A. Yes, sir.

Mr. FAULKNER.—I think that's all.

Q. Oh, Mr. Stensland, I just want to ask you this: You say you saw some eggs down there in September of this year? A. Yes, sir.

Q. Did you estimate the number of eggs you saw?

A. Why we dug a lot of them out of the gravel. I estimated the percentage that was dead and that was alive.

Q. How did the percentage run?

A. Two out of twelve.

Q. Were dead?

A. Ten dead eggs out of a dozen.

The COURT.—There were ten dead eggs out of a dozen?

Q. Ten dead eggs.

A. That's under natural spawning conditions.

Q. Now, Mr. Stensland, as a matter of fact, do you know whether the territorial fish hatchery sent down there to get salmon eggs and couldn't get any this year?

A. I don't know anything about that.

Redirect Examination.

(By Mr. STABLER.)

Q. During the times that you were out on this creek in 1924, was the creek dry? A. No.

Q. Did you see it at any time in 1924 when salmon couldn't get up that stream?

(Testimony of Iver N. Stensland.)

A. No; not in 1924. There was plenty of water, lots of water [71] for salmon to go up all summer.

Q. How does the percentage of fertile and nonfertile eggs which you found in this stream compare with the percentage of fertile and nonfertile eggs found in other streams?

A. Just about the same.

Recross-examination.

(By Mr. FAULKNER.)

Q. Mr. Stensland, most of those eggs you found there were dry, weren't they?

A. They were. We dug them out of the gravel, out of the damp gravel.

Q. After the water had gone down?

A. They had been spawned during the freshet when the gravel bar was covered.

Q. How far up was that?

A. That was a thousand feet or so above the high-water mark.

Mr. FAULKNER.—That's all.

TESTIMONY OF EARLE L. HUNTER, FOR PLAINTIFF.

EARLE L. HUNTER, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. STABLER.)

Q. What is your name?

(Testimony of Earle L. Hunter.)

A. Earle L. Hunter.

Q. What is your position?

A. Master of the U. S. S. "Widgeon."

Q. Did you have occasion to be up around Lucky Cove this year? A. Yes, sir. [72]

Q. Were you over there about the 24th of November, 1924? A. I was.

Q. What did you do over there, Mr. Hunter?

A. Assisted in measuring the distance from the mouth of the creek to the trap lead.

Q. Now, I will call your attention to the Government's Exhibit 1 in this case, a map for identification, and ask you to step over here and point out where the measurements in which you assisted in making were taken.

A. Taken from twenty-five feet from the shore line there, from this line on here down to here (pointing).

Q. Now, on that map, at the letter B, what position is that with reference to the trap?

A. That is the shore end of the trap lead.

Q. And the letter A on that map, what does that letter indicate there?

A. That indicates the mean low-water mark of the stream, the mouth of the stream at mean low water.

Q. Now, where, with reference to the letter A, does the fresh water and salt water meet at mean low tide? A. Right there (pointing).

Q. And you measured the distance from B to A, is that correct? A. Well, I assisted.

(Testimony of Earle L. Hunter.)

Q. Yes. A. Yes, sir.

Q. What is the distance from the point B, indicating the lead of the trap, to point A, indicating the mouth of the stream? That is, where fresh water meets salt water at mean low tide.

A. 978 feet.

Q. How was that measurement taken, with what kind of instrument? [73]

A. Steel tape, U. S. Government tested.

Q. Who assisted you in making this—

A. Mr. Ball, Captain Stensland and Mr. Ragan.

TESTIMONY OF ANTHONY McCUE, FOR PLAINTIFF.

ANTHONY McCUE, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. SHOUP.)

Q. Please state your name.

A. Anthony McCue.

Q. What is your occupation?

A. Fisheries.

Q. Are you employed by the Booth Fisheries Co.? A. Yes, sir.

Q. In what capacity? A. Superintendent.

Q. What cannery are you superintendent of?

A. Quadra.

Q. Sir? A. Quadra.

Q. Quadra? A. Yes, sir.

(Testimony of Anthony McCue.)

Q. Now, do you know the relationship between the Booth Fisheries Company and the Northwestern Fisheries Co.? A. Yes, sir.

Q. What is it?

A. The Booth Fisheries Co. are the owners of the plants and traps and the Northwestern Fisheries Company are the operators. [74]

Q. To whom does the Northwestern Fisheries Co. belong? A. Booth Fisheries Co.

Q. Has the Northwestern Fisheries Company any assets or liabilities?

A. Couldn't tell you that.

Q. Are you acquainted with the trap at Lucky Cove? A. Yes, sir.

Q. When did you put that trap in this year?

A. 29th of June.

Q. 29th of June? A. Yes, sir.

Q. How long did you fish it?

A. Well, it wasn't fishing on the 29th of June. It hadn't fished any until the third of August or July.

Q. The third of July? A. Yes, sir.

Q. And then did you fish continuously until the 19th of August until the close season?

A. Continuously, or closed down Saturday night at six o'clock until Monday morning at six o'clock.

The COURT.—Saturday night until Monday morning? A. Yes, sir; Saturday evening.

Q. Each week? A. Each week.

Q. To whom was the license for the operation of that trap issued? A. Booth Fisheries Company.

(Testimony of Anthony McCue.)

Q. And to whom was the permit by the Secretary of War issued to put in the trap?

A. That I don't know. [75]

Q. To whom do the fish belong that are caught in the trap?

A. The cannery is operated by the Northwestern Fisheries Company.

Q. Is it not a fact that the Booth Fisheries Company pays all the bills for the operation of that trap?

A. I couldn't say.

Q. You didn't handle the money? A. No, sir.

Q. Did that trap fish on July 26th this year?

A. I couldn't say that. I don't know whether July 26th was Sunday or Monday. It was fishing during July.

Q. Well, I'll show you the calendar for the month of July, 1924, and ask you whether or not you were fishing then? A. Yes, sir.

Q. That was on Saturday? A. Yes, sir.

Q. And you fished until six o'clock? And the day before, Friday the 29th of July, was the trap fishing? A. Yes, sir.

Q. Do you know, as a matter of fact, that—

A. (Interrupting.) Beg pardon?

Q. I say, you know, as a matter of fact, that it was, don't you? A. Yes; I think so.

Q. How many fish were caught in that trap in the year 1924, Mr. McCue? A. 57,000.

Q. Salmon? A. Yes, sir.

Q. How long have you been superintendent of that cannery? A. One year. [76]

(Testimony of Anthony McCue.)

Q. This is your first year? A. Yes, sir.

Q. Did you ever examine the creek?

A. Yes, sir.

Q. When?

A. Oh, I don't know the dates. I have them—I have a memo in my pocket.

Q. Just refer to it.

A. I first examined the creek on the ninth of July.

Q. Was the trap fishing at that time?

A. Yes, sir.

Q. How far up the creek did you go?

A. One mile.

Q. Did you find any salmon? A. No, sir.

Q. When again did you examine it?

A. On the 29th of July.

Q. Was the trap fishing then? A. Yes, sir.

Q. Find any salmon in the creek? A. No, sir.

Q. When did you examine it again?

A. The 16th of September.

Q. Was the trap fishing then? A. Yes, sir.

Q. 16th of September?

A. No, sir; not the 16th of September; 16th of August, I should say.

Q. Oh, the 16th of August? A. Yes. [77]

Q. Did you find any fish in the creek on the 16th of August? A. No, sir.

Q. Was the trap fishing then, the 16th of August?

A. I don't remember whether it was or not. It was there. I don't know whether it was fishing that

(Testimony of Anthony McCue.)

day or not. I don't know whether the 16th was on Sunday or Monday.

Q. Saturday.

A. Saturday? Well, it fished part of the day.

Q. Did you go up the creek again?

A. I was up the creek on September 25th.

Q. That's after the gear was taken off the trap?

A. Yes, sir.

Q. Did you find any salmon there then?

A. No, sir.

Q. That's this year? A. Yes, sir.

Q. How far up did you go?

A. About a mile and a half.

Q. Find any salmon? A. No, sir.

Q. Find any spawn? A. No, sir.

Q. Did you see any dead salmon?

A. Yes, sir.

Q. Dead salmon on the banks? A. Yes, sir.

Q. All the way up? A. No, sir.

Q. How far up?

A. About, I should judge, six or seven hundred feet. [78]

Q. From the mouth of the creek? A. Yes, sir.

Q. Mr. McCue, do you remember the occasion of Mr. Thue's going up there? A. Yes.

Q. How did it happen that you did not go on that occasion?

A. Why I had an attack of grippe at that time and was—

Q. (Interrupting.) You were sick?

A. Yes, sir.

(Testimony of Anthony McCue.)

Q. Did you receive any communication from Mr. Ball relative to going up there? A. No, sir.

Q. From anybody of the bureau?

A. Yes; I had a wire from Mr. Stensland, I think.

Q. Did you send Mr. Thue in your place?

A. Yes, sir.

Q. You weren't there on November 24th?

A. No, sir.

Mr. SHOUP.—That's all.

Cross-examination.

(By Mr. FAULKNER.)

Q. How did Mr. Ball come to send Mr. Stensland down there, if you know, in September to examine the stream?

A. Why, Mr. Ball and Mr. O'Malley were at the cannery, I think on July 28th, and Mr. O'Malley said that he had met P. H. McCue—

Mr. STABLER.—(Interrupting.) We object, if the Court please, on the ground that it's purely hearsay—any conversation that he had with Mr. O'Malley is certainly not competent now. [79]

The COURT.—I'll hear from you.

Mr. FAULKNER.—Well, that's probably correct.

Q. I just wanted to know if you know, Mr. McCue, how Mr. Ball happened to send Mr. Stensland down. Did you request him?

A. Yes, I did. I asked Mr. Ball and also Mr. O'Malley if they would go down to Lucky Cove Creek and make an inspection of that creek with me.

(Testimony of Anthony McCue.)

Q. And is that why they wired you?

A. Yes, sir.

Mr. FAULKNER.—That's all.

Redirect Examination.

(By Mr. SHOUP.)

Q. I want to ask you another question on direct examination. Are you acquainted with P. H. McCue? A. Yes, sir.

Q. What position, if any, does he occupy with the Booth Fisheries Company?

A. General manager and vice-president.

Q. I show you this and ask you if you recognize that signature? A. Yes, sir.

Q. Mr. McCue is your father? A. Yes, sir.

Q. Do you know Mr. Smithers? A. Yes, sir.

Q. What position does he occupy with the Northwestern Fisheries Company?

A. Well, I don't know whether he occupies any in the Northwestern Fisheries or not. He's the vice-president of the Booth Fisheries Co.

Mr. SHOUP.—That's all. [80]

TESTIMONY OF JOHN H. DUNN, FOR PLAINTIFF.

JOHN H. DUNN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. SHOUP.)

Q. Your name is John H. Dunn? A. Yes, sir.

(Testimony of John H. Dunn.)

Q. Clerk of this court? A. Yes, sir.

Q. As such clerk you have the custody of the financial reports of foreign corporations doing business in the Territory of Alaska?

A. We get a copy of their financial reports.

Q. I will ask you whether or not the reports of the Northwestern Fisheries Corporation are filed in your office? A. They are.

Q. Have you the annual report of the financial condition of the Northwestern Fisheries for the year 1923–24?

A. That is for the year ending 1923, on the face of it; that's what is shows.

Q. The year 1923? A. Yes, sir.

Q. You have that? A. Yes, sir.

Q. And is that a copy or is that the original?

A. It's the original. They have to file copies in the district clerk's office and in the secretary's.

Q. By whom is that signed?

A. P. E. Smithers—I can't quite make out the initials.

Q. What title? [81] A. Vice-president.

Q. What corporation?

A. This is the Northwestern Fisheries Company —Northwestern Fisheries Company is a corporation—by Smithers, Vice-president.

Q. What does that statement show as to the assets and liabilities of the Northwestern Fisheries Company?

The COURT.—What is the purpose of this?

Mr. SHOUP.—Well, the question is— There

(Testimony of John H. Dunn.)
has been some testimony that the other corporation should be indicted, and there has been some testimony to the effect that the Northwestern Fisheries Company was fishing this trap and not the Booth Fisheries Company, and I want to show that they are one and the same.

The COURT.—I don't see how that has any effect on it.

Mr. SHOUP.—It will, if your Honor will let me introduce the document.

The COURT.—If there is no objection.

A. This statement shows that the company has no property and the statement says the company has no liabilities.

Q. What is that other paper you have in your hand?

A. That's a letter signed by Mr. P. H. McCue.

Q. Who is he?

A. Manager of the Booth Fisheries Company, or of the Northwestern Fisheries Company, I can't tell from the letter which.

Q. What is that?

A. It's a letter from P. H. McCue.

Mr. FAULKNER.—Oh, I don't think that's material. I object to it as incompetent, irrelevant and immaterial and not the best evidence. [82]

The COURT.—I think I'll admit the statement.

Q. I wish you would read that letter to the jury.

The COURT.—It may be received.

(Whereupon a letter, dated February 16, post, was received in evidence and marked Plaintiff's Exhibit No. 1.)

(Testimony of John H. Dunn.)

The WITNESS. — (Reading:) "Northwestern Fisheries Company, Booth Fisheries Co., owner; General Offices 600 Marion Building, Seattle, Washington; February 16, 1924. Clerk of the U. S. District Court, Division No. 1, Juneau, Alaska.

"Dear Sir:

"We enclose herewith one copy of annual report for 1923 for the Northwestern Fisheries Company, for filing in your office, together with 10¢ in stamps to cover filing fee.

"The original has been filed with the Secretary of the Territory.

"In explanation of the fact that the Northwestern Fisheries Company has no property or liabilities, beg to advise that said company is owned by the Booth Fisheries Company, Chicago, Illinois, and is not actively operating, but the organization of the corporation is maintained to preserve the name of the Company and its use in connection with the business of the Booth Fisheries Company.

"Kindly acknowledge receipt and oblige,

"Very truly yours,

"P. H. McCUE,

"Manager."

The COURT.—To show that the Northwestern Fisheries Company is not actively operating.

Mr. SHOUP.—Well, our contention is that they are one and the same.

The COURT.—The only question in my mind is that if the [83] Northwestern Fisheries Com-

pany is operating and this indictment is against the Booth Fisheries Company, why the Booth Fisheries Company would not be liable if the Northwestern Fisheries Company was operating—

Mr. FAULKNER.—The Northwestern Fisheries Company was operating the trap. As I say, the only purpose of the whole thing is this: we don't want to have the trial result in an acquittal of the Booth Fisheries Company and then have to try the Northwestern Fisheries Company, and for that reason I wouldn't object to their adding the name of the Northwestern Fisheries Co. as defendant in this case.

Mr. STABLER.—Now, we object to any argument of this case before the jury. That matter has been satisfactorily explained to the Court. If he wants to offer any evidence, we have no objection to that.

The COURT.—The letter will be admitted in evidence.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit No. 1.)

TESTIMONY OF IVER N. STENSLAND, FOR PLAINTIFF (RECALLED).

IVER N. STENSLAND, recalled as a witness on behalf of the plaintiff, having been already duly sworn, testified as follows:

Direct Examination.

(By Mr. STABLER.)

Q. Mr. Stensland, you testified in this case that

(Testimony of Iver N. Stensland.)

you were over at Lucky Cove around this stream emptying into Lucky Cove on the 23d day of July, 1924. A. Yes, sir.

Q. 24th of July, 1924? A. Yes, sir.

Q. 31st of July, 1924? [84] A. Yes, sir.

Q. August 6th, August 7th? A. Yes, sir.

Q. September 11th, 12th, September 14th and September 15th? A. Yes, sir.

Q. Now, did you make any observations around there during the time the trap was fishing and its fishing position to notice what the salmon were doing around the mouth of this stream?

A. Yes, sir.

Q. Now, what was the effect of this trap being in this position with reference to salmon approaching the stream?

Mr. FAULKNER.—I object to it as incompetent, irrelevant and immaterial. The question is whether the trap was within the prohibited distance and whether it is a salmon stream.

The COURT.—No; not under the statute. Objection overruled.

A. When I was in Lucky Cove—

Mr. FAULKNER.—I ask an exception.

The COURT.—You may take an exception.

The WITNESS.—Answer the question?

Mr. STABLER.—Yes.

The COURT.—Yes.

The WITNESS.—When I was in Lucky Cove on those occasions, examining the trap and the stream, I saw fish schooling around the bay, or in

(Testimony of Iver N. Stensland.)
the cove, in front of the trap, or in front of the mouth of the creek, and on those same occasions I didn't see any fish going up the stream because the trap was catching the fish that was acclimatizing themselves around the mouth of the stream. They were coming from the salt water and naturally they couldn't stand the sudden change from salt water to fresh water. They play [85] around the mouth of the stream for several days until they get acclimated and get a chance to get ready to go up the stream, and while they were circling around the bay, this trap was so close to it that they were getting caught, and that's the reason there was no fish in the mouth of the stream, and I didn't expect to find any while the trap was there because that's the way it was last year.

Now, what was the effect after this trap was removed and you went to the trap on September 11th, September 12th, September 14th and September 15?

A. I went there for the purpose of determining the escapement of fish that was going to the stream, to report to the Bureau of Fisheries, and I knew there would be fish in the stream, which there was at that time, and that's the time I went two miles up the stream and made my estimations of what I found there—eighty per cent humpies and 20 per cent dogs—and the trap had been out a long time so that the fish had a chance to get up.

Q. You know when the fish start to run in that part of the country?

(Testimony of Iver N. Stensland.)

A. Yes, sir. They start to run up through Revillagigedo Channel and up past this trap there in July around after the fourth or the first part of July.

Mr. STABLER.—That's all.

Cross-examination.

(By Mr. FAULKNER.)

Q. How long did they run after that, Mr. Stensland?

A. Oh, they kept running up until September.

Q. Now, what do you mean by "running"? [86]

A. Why, coming up from the ocean. They were catching them in the trap.

Q. Now, they come into the stream at that time, during that period, do they? A. Yes, sir.

Q. How long do they continue to pass into the stream?

A. It's a long time after that, after they come past those traps out in the channel and until they actually go up into the stream.

Q. I mean, how long does that period extend that they are passing into the streams from deep water?

A. Well, they start into those streams about the 15th or 20th of July. They start into those streams, a few of them, and then later on, the latter part of July, there is quite a number gets into those streams along there, and in August and even in September there's fish going up the streams.

(Testimony of Iver N. Stensland.)

Q. Do they continue until the last of September?

A. Yes.

Q. Longer than that?

A. Oh, yes; they continue till the first of November in a good many places.

Q. Going into the streams? A. Yes.

Q. Now, when they get into the streams, how long do they generally continue there?

A. How long they're in the streams?

Q. Yes.

A. Oh, they're in there a couple of weeks, about, until they die; about that time in those short streams.

Q. Now, as a matter of fact, don't some of them stay in the [87] streams until November and December?

A. Cohoe is a later run of fish and they're found in December.

Q. Aren't the dogs also?

A. Well, in some places there's some dogs found in the first part of December, but it's very seldom.

Redirect Examination.

(By Mr. STABLER.)

Q. Now, just one more question about your visit over there in 1923. You testified, I believe, that you were there on August 8th and September 21st, 1923? A. Yes, sir.

Q. What was the condition of the weather during those months with reference to the rainfall?

A. Well, in 1923, it was one of the driest seasons and lowest stages of water in the creeks that I have known of in Alaska and many of the streams was

(Testimony of Iver N. Stensland.)

dry and a lot of the good streams was almost dry.

Q. Now, with reference to this particular stream was it entirely dry during any of your visits in 1923? A. No; not entirely dry.

Q. Was it dry enough to prevent salmon from getting into that stream?

A. No; it was passable for salmon.

Mr. STABLER.—That's all.

Recross-examination.

(By Mr. FAULKNER.)

Q. During those times that you have mentioned when the fish were coming into this place, this bay or cove, what became of them during the close period from Saturday night until Monday morning of each week? [88] A. Well, between—

Q. (Interrupting.) What's that?

A. Between Saturday night and Monday morning of each week, there's a 36 hours' close season.

Q. Well, would the fish stop then and wait for the trap to open up or would they go on in?

A. Well, they would be circling around for probably two weeks around a place like that.

Q. None of them would go into the mouth of the creek then? A. No.

Q. They were all over on that shore where the trap was?

A. Fish usually play around the mouth of a stream, this stream as well as all the other salmon streams where it enters into salt water, for ten days or two weeks, and they would be caught dur-

(Testimony of Iver N. Stensland.)
ing that time and there wouldn't be any left to go up.

Q. Well, now, Mr. Stensland, from the end of that trap in Lucky Cove over to the other shore there is some place, isn't there? I mean from the outside, from the spiller of the trap? A. Yes.

Q. To the island, to the other shore?

A. To the island; yes.

Q. There is some space in there? A. Yes.

Q. How much?

A. Oh, there's a space there of probably somewheres over a thousand feet.

Q. Now, fish could go in there? A. Oh, yes. [89]

Q. You mean to say that none of them could go up in there?

A. That is the only way they could get into that bay is through that space.

Q. Do you mean to say that none of them would go in there during the weekly close period?

A. That's where they come in. They would come in between the trap and that island and they would be in front of the creek and that's where they would circle around to acclimatize themselves and be caught while they were doing that.

Q. Did you ever see any going out of there?

A. Fish going out?

Q. Yes.

A. Well, they would be going in, back and forth.

Q. Do you mean to say that they would go in

(Testimony of Iver N. Stensland.)

there and back out again and circle around the trap? A. Oh, yes.

Q. They would? A. Yes.

The COURT.—I would like to ask you a question or two, Mr. Stensland. You have examined this trap, haven't you? A. Yes, sir.

The COURT.—Did it have a double heart or single heart?

A. I couldn't tell you for sure whether it was a double heart or a single heart. I examined it with reference to the heart walls next to the pot and the tunnel aprons.

Redirect Examination.

(By Mr. STABLER.)

Q. Let me ask you one more question. Did you make an examination of the opening in the heart with reference to whether [90] the trap was fishing from one side or from both sides?

A. Oh, yes.

Q. What was your observation?

A. It was fishing on both sides.

TESTIMONY OF EDWARD M. BALL, FOR PLAINTIFF (RECALLED).

EDWARD M. BALL, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. SHOUP.)

Q. Mr. Ball, when did you first find out that this

(Testimony of Edward M. Ball.)

trap was located within the prohibited distance from the mouth of that creek?

A. On the 26th of July.

Q. What year? A. 1924.

Q. Sir? A. July 26, 1924.

Q. When were you first informed that there was a trap there?

A. We had reports in 1923 about the location of this trap, but no satisfactory measurement was made from the trap to the mouth of the creek at low water.

Q. How does it happen that you did not start this prosecution in 1923?

A. For the reason that there was a question about the character of this stream, whether salmon used it for spawning, and in order not to prejudge the company we decided to make a further observation this year.

Q. I will ask you whether or not in the spring of 1924 you communicated with this corporation regarding the number of traps and the location of the traps that were put in? [91]

A. I addressed and mailed a letter to the Northwestern Fisheries Company at Quadra, on May 28, 1924, asking them for a list of the traps they would operate in connection with their cannery and the location of each one.

Q. What reply did you receive?

A. I received no reply.

Q. When were you first informed that this trap was put in in 1924?

(Testimony of Edward M. Ball.)

A. On the 25th of July, 1925, when I reached Ketchikan.

Q. Nineteen twenty—? A. '24.

Q. That was the first you knew about the trap being in?

A. Yes, and we went to the trap the next day.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Ball, you wrote this letter on May 28th?

A. Yes, sir.

Q. That was a circular letter, wasn't it?

A. I addressed a similar letter to every cannery in southeastern Alaska.

Q. Now, wasn't the principal part of that letter dealing with the method of opening heart walls during the Sunday close period?

A. There was a paragraph in the letter devoted to that subject, the opening, and the second paragraph had to do with the location of the traps.

Q. That was written on May 28th?

A. It was to this particular company. I sent some out on the 24th of May. [92]

Q. Then you wrote a letter about June ninth, rescinding the instructions contained in your first letter, didn't you?

A. In so far as the opening of the heart walls is concerned.

Q. You told them in that letter to disregard the letter of the 28th?

A. Not in its entirety. I told them in so far as

(Testimony of Edward M. Ball.)

the instructions in regard to the opening of the heart walls were discussed in the letter of May 28th, they would be disregarded.

Q. Now, you examined the records in the treasurer's office, you say, this morning? A. Yes, sir.

Q. And ascertained the name of the company that took out the license? A. Yes.

Q. But you didn't notice the date?

A. Not the date of the license.

Q. You don't know that? A. No.

Q. Do you know whether it was in January of this year?

A. I think it was early in the year.

Q. Early in January?

A. Because of the number that was given to this particular trap.

Mr. FAULKNER.—That's all.

Mr. SHOUP.—That's our case.

Mr. FAULKNER.—If the Court please, the defendant now moves the Court to dismiss counts two and three in the information which is numbered, I think, 1778—the last information that was filed. Those are two counts that charged the company with fishing on September 10th and 11th. The evidence [93] shows that they were not fishing—

Mr. STABLER.—(Interrupting.) We have no objection.

The COURT.—Yes; they will be dismissed as to those two counts.

(Testimony of Iver Thue.)

Whereupon the defendant, to maintain the issues on its part, introduced the following testimony, to wit:

TESTIMONY OF IVER THUE, FOR DEFENDANT.

IVER THUE, called as a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Thue, you testified that you went up the little stream at Lucky Cove with Mr. Stensland on September 15, 1924? A. Yes, sir.

Q. And you say you saw some salmon there?

A. Yes, sir.

Q. Some dogs and humpbacks? A. Yes, sir.

Q. And also, I think you said you saw some eggs? A. Yes, sir.

Q. About how many eggs did you see?

A. About a hundred, I should judge.

Q. About a hundred? A. Yes.

Q. Did anybody gather those eggs? A. Yes.

Q. Who?

A. Mr. Stensland and his deck-hand and myself.

Q. Now, what is the average number of eggs that a cohoe or humpback or dog salmon would lay in a season? A. About 3,000. [94]

Q. Mr. Thue, have you been at the location of this trap many times during the past season?

(Testimony of Iver Thue.)

A. About four times, I should judge.

Q. What's that? A. About four times.

Q. Did you see, at any of those times, any seine fishermen fishing between the trap and the mouth of the creek? A. Yes, sir.

Mr. STABLER.—We object to the question, if the Court please, as incompetent, irrelevant and immaterial and as having no bearing on the case.

The COURT.—Objection sustained.

Mr. FAULKNER.—We'll ask an exception.

Q. Mr. Thue, do you know Mr. Olson who testified here this morning? A. By sight, yes, sir.

Q. Did you have any conversation with him this morning regarding this case? A. Yes.

Q. Where was that? A. Out in the hall.

Q. Now, at that time did he tell you that he "hoped or wished that the Booth Fisheries Company would 'get it in the neck' "?

A. No; he said he was sure they would lose this case; that he was sure they would lose this case.

Q. Did he say—

The COURT.—(Interrupting.) Now, here. He has stated what he said.

Mr. FAULKNER.—Well, I just wanted to ask him a question. [95]

Q. Is that all he said? A. No.

Q. What else did he say?

Mr. STABLER.—We object to that. No proper foundation has been laid for any impeaching question except the one that he asked him in the first instance.

(Testimony of Iver Thue.)

The COURT.—Yes.

Mr. FAULKNER.—Well, I think the only way I can ask him is in those words.

The COURT.—You did ask him the words.

Q. Let me ask you this question: Don't answer this, Mr. Thue. I will ask you if he didn't say, in that talk, that—

Mr. STABLER.—We object to that. No proper foundation laid for this impeaching question.

The COURT.—Objection sustained.

Mr. FAULKNER.—We'll ask an exception.

The COURT.—You can ask him—you can put in the same question you asked him "or words to that effect."

Q. Don't answer this until the Court rules on it. Did you, in the hall this morning, have a conversation with the witness John Olson in which he said this, or words to that effect, that he "hoped or wished that in this case the Booth Fisheries Company would 'get it in the neck' "?

The COURT.—Answer that yes or no.

Q. Those words or words to that effect.

The COURT.—Yes or no.

Q. Answer that yes or no. Did you have a conversation with him in which he stated that, or words to that effect?

A. He said—

Q. (Interrupting.) Just answer that yes or no. [96]

A. No.

Q. What's that? A. No.

(Testimony of Iver Thue.)

Q. Mr. Thue, you testified this morning, or this afternoon, that this trap was in the same place in 1924 that it was in 1922. A. Yes, sir.

Q. How do you know that?

A. I was down and inspected it in 1922.

Q. Are there any marks, or is there any mark by which you can tell? A. Yes.

Q. What is it? A. There's a tree.

Q. What mark is on the tree? What has the tree got to do with it?

A. It shows by the cable that has been fastened around the tree that you fasten the lead wire to.

The COURT.—What kind of tree was it?

A. If I remember right, it was a cedar tree.

Mr. FAULKNER.—I think that is all.

TESTIMONY OF ANTHONY McCUE, FOR DEFENDANT (RECALLED).

ANTHONY McCUE, recalled as a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. McCue, you are the superintendent of the Northwestern Fisheries? A. Yes.

Q. At Quadra? [97] A. Yes.

Q. In charge of the cannery there? A. Yes.

Q. And I think you stated on your direct examination that this trap was put in early in July?

A. Yes.

(Testimony of Anthony McCue.)

Q. Or the last of June. When did you first fish it? A. July third.

Q. And the fishing was closed down, I think you stated, on the 19th of August? A. Yes.

Q. Now, did you cease fishing operations then?

A. Yes.

Q. Altogether? A. Yes.

Q. You were through for the season? A. Yes.

Q. When did you take the trap away?

Mr. STABLER.—Well, if the Court please, that was all brought out by the same witness before.

Mr. FAULKNER.—I don't think so.

The COURT.—I don't remember whether he testified that he ceased fishing on the 19th of August or not. I'm inclined to think—

Mr. FAULKNER.— (Interrupting.) What's that?

The COURT.—I'm inclined to think he did.

Mr. FAULKNER.—I'm asking him now when he took the trap away. I don't think he testified to that. Mr. Thue testified this morning the 20th or 21st.

The COURT.—Mr. Thue testified that he took it away on the [98] 20th, the next day after they ceased fishing, or the 21st.

Q. When did you take the trap away?

A. The trap was towed away on the 20th.

Q. 20th of August? A. Yes.

Q. And there was no fishing after that?

A. No.

Q. Now. Mr. McCue, were you present when Mr.

(Testimony of Anthony McCue.)

Ball and Mr. O'Malley came down to the cannery in July? A. Yes.

Q. Who is Mr. O'Malley?

A. He's the Commissioner of Fisheries.

Q. Head of the Fisheries Bureau in Alaska?

A. Yes.

Q. Did you have any conversation with them about this trap? A. Yes.

Q. Did he make any complaint about that—

Mr. SHOUP.—I object to any conversation with Mr. O'Malley. Mr. O'Malley is not on the witness-stand. It's only hearsay.

Mr. STABLER.—He has already testified to that, your Honor. He testified to that before.

Mr. FAULKNER.—Well, I don't want to ask him twice, but I don't recollect—

The COURT.—(Interrupting.) I don't recollect that he testified as to what conversation he had with Mr. Ball or with Mr. O'Malley.

Mr. STABLER.—I think he did.

The COURT.—I don't recollect it.

Mr. FAULKNER.—No; I don't think he did. The reporter can look back and see. Well, I'll withdraw the question. [99]

Q. Mr. McCue, you say this was your first year as superintendent? A. Yes.

Q. Were you ever there before? A. Yes.

Q. What year? A. 1918.

Q. Was this particular trap at Lucky Cove in there then? A. Yes.

Q. At what point? A. Same identical point.

(Testimony of Anthony McCue.)

Q. Were you at the trap that year? A. Yes.

Q. Do you know Mr. Kerr who testified this morning? A. No, sir.

Q. Was he watchman at that trap in 1918?

A. Not that I know of.

Q. Was there any man by the name of Olson superintendent of the cannery at Quadra in 1918, or at any other time? A. No, sir.

Q. Now, you testified that you had been up this creek in September of this year? A. Yes, sir.

Q. Now, Mr. McCue, when did you leave Quadra to go to the States? A. September 23d.

Q. Did you at that time take the crew with you?

A. Yes.

Q. Now, during the fishing season did you have a watchman on this trap?

A. Yes; we had two. [100]

Q. Where are they now? A. California.

Q. Do you know where they are? Do you know their address? A. I do not.

Q. When did they go to California?

A. They left for California three days after we arrived in Seattle.

Q. And you left Quadra on the 23d of September?

A. Yes, sir.

Q. When you went up the stream on September 21st, or whatever date it was, how far up did you go? A. About a mile and a half.

Q. How long is that creek?

A. About a mile and a half.

(Testimony of Anthony McCue.)

Q. Now, you have been up there on other occasions A. Yes.

Q. Now, what was the condition of the water in the creek when you were up there during the other time that you have testified to?

A. The last time?

Q. No; the other time. Was there water in the creek or not? A. Very little.

Q. Now, were there any times when the creek was dry? A. Not absolutely.

Q. Not absolutely? A. No.

Q. How much water was there in it?

A. During July, the greater part of August, too, why, I should judge there was about two or three inches of water in the creek.

Q. What is the bed of the creek like? [101]

A. Rocky.

Q. Are there any sand bars or gravel bars in the creek? A. There are some near the beach.

Q. Some near the beach?

A. Within 500 feet of the beach or salt water.

Q. Now, up at the upper end of the creek, at its source, what kind of country is it?

A. Muskeg.

Q. Muskeg?

A. Sort of muskeg-like at the head of the creek.

Q. Now, Mr. McCue, how long have you been engaged in the fish business? A. Since 1912.

Q. Has that been experience around canneries during that period? A. Yes.

Q. Every year? A. Yes.

(Testimony of Anthony McCue.)

Q. Do you know the habits of humpbacks and dog salmon when they enter fresh water?

A. Quite well.

Q. Now do you know the nature of the creeks in which they go to spawn? A. Yes.

Q. Is this one of the creeks— Is this a salmon stream? A. No.

Q. Now, you say that when you were up there in September, you didn't see any salmon?

A. I saw a few dead salmon.

Q. On the banks? [102] A. Yes.

Q. Now, if dogs go into a creek late in September, say about the 15th of September would they usually be gone out of there by the 21st of September, or say, by the 25th of November?

A. No; I have seen dogs in streams up until the tenth of December at least.

Q. Up until the tenth of December. And when they get into a place like that, if there is water in there, do they usually come out or do they usually stay in?

A. On some occasions they back out with the tide. They go in with the salt water and back out with the salt water.

Q. But if they go into fresh water, do they usually stay up there? A. Yes.

Q. I think you testified that the reason you didn't go previously with Mr. Stensland to make this examination was that you were sick? A. Yes.

Q. Has this creek any name?

A. It has a local name.

(Testimony of Anthony McCue.)

Mr. FAULKNER.—I think that's all.

Cross-examination.

(By Mr. SHOUP.)

Q. What is the local name of that creek?

A. Lucky Cove.

Q. Lucky Cove Creek? A. Yes.

Q. Who did you say left Quadra on September 23d to go to Seattle? [103]

A. I left and the cannery crew also left.

Q. This year? A. Yes, sir.

Q. Now, when was it that you were up this creek in September? A. 21st.

Q. Is that the last time you were up there?

A. Yes.

Q. How much water was there in the creek then?

A. A part of the creek was dry, and in some of the holes there was from a foot to three feet of water, in the holes.

Q. Were there any places where the creek was absolutely dry? A. No.

Q. Well, by two or three inches, do you mean that it was two or three inches deep, or do you mean two or three miner's inches of water?

A. Two or three inches of water, deep.

Q. That was at the riffles? A. On the rips.

Q. Between the holes? A. Oh, yes.

Q. Isn't it a fact that salmon can go up a place where there is two or three inches of water?

A. All depends on the kind of salmon.

Q. Well, dog salmon?

(Testimony of Anthony McCue.)

A. Dog salmon? Well, I don't think they could get over that.

Q. How about humpbacks? A. Humpbacks?

Q. Yes.

A. I think a humpback could get there in three inches of water.

Q. A humpback could go up in very little water? [104]

A. I don't think they could get up on less than three inches.

Q. You say this is not a salmon stream?

A. I have never considered it a salmon stream.

Q. What do you consider a salmon stream, or what is your definition of a salmon stream?

A. I consider a salmon stream where there is salmon in the stream during the salmon season.

Q. Will you please repeat that?

A. I consider a salmon stream a salmon stream during the run of salmon, during the salmon season.

Q. What is a salmon season?

A. The salmon season depends entirely on the different districts.

Q. At that place?

A. At that place from July first until November 25th or the first of December, in that district.

Q. Then if there are any salmon running up that stream during that time for the purpose of spawning, wouldn't that be a salmon stream, according to your definition?

A. If any salmon?

Q. If any salmon went up there at all during

(Testimony of Anthony McCue.)
that period, it would be a salmon stream, wouldn't it?

A. If salmon went up there, it would be a salmon stream, I suppose, providing sufficient salmon went up. Salmon sometimes back up with the tide.

Q. How far could they back up in Lucky Cove Creek?

A. I never saw any salmon in the creek.

Q. You saw a few dead salmon?

A. I saw a few dead salmon on the banks.

Q. But regardless of what you have seen, how far could they back up the stream on the tide? [105]

A. I should judge three-eighths of a mile.

Q. And those salmon would simply back in there as the tide went in and out again? A. Yes.

Q. You heard Mr. Thue testify that he saw two or three hundred fish in Lucky Cove creek this year, several hundred feet up above high-tide line, did you not?

A. I don't know whether I heard him say high-tide line or not.

Q. Seven or eight hundred feet?

A. I heard him say 800 feet from the mouth of the stream.

Q. 800 feet from the mouth of the stream?

A. Yes.

Q. Now, that was on September 15th of this year?

A. Yes.

Q. Were fish running at that time?

A. Beg pardon?

(Testimony of Anthony McCue.)

Q. Were salmon running at that time?

A. On September 15th?

Q. Yes. A. Yes.

Q. Now, assuming that Mr. Thue's telling the truth and that fish were in there on that day as he said he saw them, would you consider that a salmon stream? A. No.

Q. You wouldn't? A. No.

Q. Now, please define just what a salmon stream is?

A. Well, you'll have to ask someone else besides me. I couldn't tell you exactly because if that's a salmon stream, there are thousands of salmon streams in Alaska that are not [106] considered salmon streams.

Mr. SHOUP.—Now, if the Court please, we object to that statement and move to strike it out as not responsive to the question. It's all voluntary on his part.

The WITNESS.—I'm not an authority on salmon by any means. There is no one that knows exactly—

The COURT.—(Interrupting.) Well, now, wait a moment. You are not here to talk right along. You are on the witness-stand to answer questions that are asked. The answer will be stricken.

Mr. STABLER.—What is the Court's ruling?

The COURT.—It will be stricken—his voluntary remarks.

Q. Now, Mr. McCue, you don't consider yourself sufficient of an expert to testify as to what is a salmon stream?

(Testimony of Anthony McCue.)

A. I think that a salmon stream is a stream—

The COURT. — (Interrupting.) Answer the question.

Q. Do you or not?

The COURT.—Do you or do you not? A. No.

Mr. SHOUP.—That's all.

TESTIMONY OF STANLEY ADAMS, FOR DEFENDANT.

STANLEY ADAMS, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you state your name?

A. Stanley Adams.

Q. Where do you live? A. At Ketchikan.

Q. How long have you lived there? [107]

A. Thirteen years.

Q. Do you know where Lucky Cove is?

A. Yes, sir.

Q. Have you ever been there? A. I have.

Q. Do you know where the brook or stream is in Lucky Cove? A. Yes, sir.

Q. Have you been up that stream, Mr. Adams?

A. Quite a ways; yes, sir.

Q. How far?

A. Why, I would estimate it at a mile and a half or two miles possibly.

Q. Is that up to the source?

(Testimony of Stanley Adams.)

A. Not quite to the source, but where the stream practically gives out.

Q. How many times have you been up there?

A. I don't know exactly now. I would say that I have been there six or seven times in the period that I have been in Alaska.

Q. What took you out there? A. Trout fishing.

Q. Trout fishing?

A. Fishing for trout; yes, sir.

Q. What time of the year? During what months?

A. I have been there in June and in July and in August and once in the winter time.

Q. Once in the winter? A. Yes.

Q. At any of those times did you ever see any salmon in that stream?

A. I have no recollection of seeing any salmon in Lucky Cove Creek. [108]

Q. What kind of salmon did you catch?

A. Small rainbow trout.

Q. Did you ever catch any Dolly Vardens?

A. Not to my recollection; not in that creek; no sir.

Q. Do you do a good deal of fishing?

A. Quite a little trout fishing; yes, sir.

Q. Did you ever catch any Dolly Vardens?

A. Oh, yes; lots of times.

Mr. SHOUP.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—I don't see the purpose of it.

Mr. FAULKNER.—Well, the purpose of it is to find out whether Mr. Adams knows whether that

(Testimony of Stanley Adams.)

is a salmon stream or not. There are certain species of trout that are always found in salmon streams, and I want to find out if there were any of that species in this creek.

The COURT.—You better ask him first—

Mr. FAULKNER. — (Interrupting.) What's that?

The COURT.—You can ask him if that is so first.

Q. Mr. Adams, is there any particular species of trout that you find in salmon streams?

A. I found three species of trout in salmon streams.

Q. Well, is there one species of trout that always goes into salmon streams, that you always find in streams where there are salmon?

A. Well, you usually find the Dolly Varden.

The COURT.—Now, answer that yes or no.

The WITNESS.—Yes; I would say yes.

Q. What kind? A. Dollies. [109]

Q. Did you ever find any Dolly Vardens in this stream?

A. No, sir; not in Lucky Cove Creek, I never have caught a Dolly there.

Cross-examination.

(By Mr. SHOUP.)

Q. Are you engaged in the fishing business?

A. No, sir.

Q. What is your occupation?

A. With J. R. Heckman & Co., in the hardware department.

(Testimony of Stanley Adams.)

Q. You were simply up there on a sporting trip, were you not? A. Yes, sir.

Q. And in answer to Mr. Faulkner's question if you caught any Dolly Vardens there, you said you had no recollection? A. Yes, sir.

Q. Is that true?

A. That's true and also true of another creek close by.

Q. You may have caught them there?

A. Possibly, but I have no recollection of it.

Q. And you don't know positively whether there are Dolly Vardens in that creek or not?

A. I can't state positively.

Q. There may be? A. There may be; yes, sir.

Q. Now, Mr. Faulkner asked you if you saw any salmon in there and you said you had no recollection of seeing any salmon, is that what you meant?

A. That's what I meant to convey. I never saw any salmon up there.

Q. You have no recollection of it?

A. I have no recollection of seeing any on any of my trips. [110]

Q. Do you know whether salmon could go up that stream? A. I don't know.

Q. Sir?

A. I can't state positively. I have only an opinion.

Q. You say you have no recollection of seeing them yourself? A. No.

Q. On those occasions were you paying particular attention to salmon?

(Testimony of Stanley Adams.)

A. Yes; and one will usually observe that. I have seen lots of salmon run.

Q. You were up there simply for trout fishing?

A. Just fishing for trout.

Q. No interest in the fishing business?

A. None whatever.

Q. Was the trap fishing there at that time?

A. The first time— I have been up in Lucky Cove before there was any trap at all.

Q. Sir?

A. I have been in Lucky Cove when there was no trap there.

Q. In what month?

A. In June and in July.

Q. How long ago was that?

A. I have no exact recollection of the date. I would say it was in 1916; possibly 1917.

Q. 1917? A. I wouldn't say for sure.

Q. Were you up there last year? A. No, sir.

Q. Were you up there in 1923? A. 1921

[111]

Q. That's the last time?

A. Last time; yes, sir.

Q. And was the trap fishing there when you were there in August? A. Yes, sir.

Q. Was the trap fishing when you were there in July?

A. I couldn't say. I don't know that I have been in Lucky Cove Creek— I know that I have been there in all three months, but I couldn't say which months or what year. It's beyond me.

(Testimony of Stanley Adams.)
I have no recollection. I had no occasion to make any record of the date.

Q. And you haven't been there since 1921?

A. No, sir; I have not.

Q. Ever been there when the trap was not fishing excepting in June and the trip you made in the winter time? A. I don't think so.

Q. The trap was always there?

A. I observed a floating trap.

Q. And the Dolly Vardens come in from the ocean the same as salmon? A. Yes.

Q. And they're caught in the trap the same as salmon? A. Yes, sir; as a rule.

Mr. STABLER.—That's all.

TESTIMONY OF A. J. SPRAGUE, FOR DEFENDANT.

A. J. SPRAGUE, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Mr. Sprague, will you state your name?

A. A. J. Sprague. [112]

Q. What is your business?

A. Oh, fish pirate.

Q. How's that? A. Fish culturist.

Q. What is the nature of your work, Mr. Sprague? What work have you been engaged in with reference to fishing?

(Testimony of A. J. Sprague.)

A. Well, the taking of trout and salmon spawn, shad and whitefish,

Q. Have you had any experience with hatcheries?

A. Yes, sir.

Q. How many years?

A. Well, practically all my life.

Q. Where were you employed this year, 1924?

A. Well, I was with the Burckhardt interests at a cannery.

Q. 1924? A. Yes.

Q. This summer?

A. And also with the Bureau of Fisheries on the census taking of salmon.

Q. What did you do for the Bureau of Fisheries—taking census? A. Yes.

Q. Where? A. Eva Lake.

Q. Now, Mr. Sprague, you say you have had experience in this kind of work all your life?

A. Practically; yes.

Q. Let me ask you this question: Do you know what a salmon stream is?

A. Well, my definition of a salmon stream, yes.

Q. What would it be? [113]

A. Well, I could make a comparison.

Mr. STABLER.—We object, if the Court please. It's a matter of law as to what a salmon stream is, and not a matter of fact.

Mr. FAULKNER.—I think counsel has asked his own witnesses this question.

Mr. STABLER.—He voluteered the information and we had to ask him; but we still maintain

(Testimony of A. J. Sprague.)

that it is a question of law and not a matter of fact to be testified to by this witness.

Mr. FAULKNER.—The question was asked of Mr. Olson and Mr. Kerr—direct question.

The COURT.—Well, I think it is a question of law, but inasmuch as the prosecution has asked the question, why I think the defense should be entitled to ask it. You may ask him.

Mr. SHOUP.—We submit that we never asked that question of any witness excepting the last witness on the stand, and we asked that on cross-examination.

The COURT.—Yes; you asked it of Mr. Olson.

Mr. FAULKNER.—And Mr. Kerr.

The COURT.—You asked them whether this was a salmon stream. You may answer.

Mr. SHOUP.—We didn't ask him for a definition of a salmon stream; we asked him if this was a salmon stream. We didn't ask him for a definition.

The COURT.—Yes; that's true.

Mr. SHOUP.—That's immaterial, too.

Q. What is a salmon stream, Mr. Sprague?

A. Well, I would say any stream that carries any number of salmon. [114]

Q. Any number. What do you mean by any number?

A. I mean, as an illustration, Gold Creek is not a salmon creek, but it carries a volume of water sufficient for that purpose.

(Testimony of A. J. Sprague.)

Q. Now, are there streams, do you know, where salmon go in, where occasionally a few salmon go in and come out again that are not salmon streams?

Mr. STABLER.—We object to that as having no bearing on this stream at all.

Mr. FAULKNER.—Your Honor, I would like to be heard on that. One of the witnesses for the Government, Mr. Stensland, has testified that he was down there on September 15th and saw a great many salmon, and Mr. McCue said he was down there one week later and didn't see any, and Mr. Ball said he was down there in November and saw none, and I want to find out, if those things are true, whether this would be a salmon stream. Salmon go into a stream with the tide and sometimes remain in there for a while and then come out.

The COURT.—He may answer.

(Question repeated by reporter.)

A. Yes, I believe that.

Q. Mr. Sprague, where do salmon spawn when they go into streams, do you know?

A. Well, they usually pick out the best available spawning grounds up on the upper reaches of the river.

Q. What kind of grounds are spawning grounds?

A. Well, gravel and sand.

Q. Do they go into rocky creeks to spawn?

A. I think we ought to ask the fish about that. I wouldn't say. [115]

(Testimony of A. J. Sprague.)

Q. Let me ask you this question, Mr. Sprague, in your experience if there were 3,000 salmon, dog salmon in a creek on the 15th of September in fresh water, would they or would they not all be gone by the 24th of November, or would they remain in that creek, some of them?

Mr. STABLER.—We object to that question as not confining it to Lucky Cove Creek.

The COURT.—What?

Mr. STABLER.—We object to it because we ask that it be confined to Lucky Cove Creek. In a good many creeks that might be true.

The COURT.—Objection overruled. He may state what his experience has been in that respect.

Q. From your experience would that be so?

A. Well, they would all be dead, that particular run of spawning salmon.

Q. They all would be dead? A. Yes.

Q. Now, how late do the dog salmon run in the year?

A. Till the 15th of December.

Q. How late do the humpbacks run?

A. Well, they're usually through by the 15th of September in this district. Of course, it varies.

Q. How late do the cohoes run?

Mr. SHOUP.—We object to this question because the witness has indicated that he is testifying from his experience in this district, whereas the prosecution in this case is based on another district 250 miles out of here.

The COURT.—Yes; objection sustained.

(Testimony of A. J. Sprague.)

Q. Have you any knowledge of the habits of salmon and the [116] condition of streams in the Ketchikan district? A. Yes.

Q. Is there any difference down there between periods of the runs of salmon?

A. Yes, I think there would be.

Q. How late do dog salmon run in that district?

A. Well, I couldn't state on the dogs. We have done no work on them, but I do know there is a late run of dogs, but the usual period of spawning for dog salmon, in this district and Ketchikan, would be from July first until December 15th. There's three or four different runs, you understand.

Q. Yes. What is the average number of eggs that a salmon would lay, a dog or humpback?

A. Oh, 3,000 would be about right.

Q. Now, Mr. Sprague, do salmon go into the same stream every year? What I mean by that if—

The COURT.—(Interrupting.) Now—well, you may explain your question.

Q. What I meant to ask him— Don't answer until the Court rules on it. Would this condition arise in this district or the Ketchikan district, that salmon would go into a stream one year and not another?

A. I didn't get that quite.

Q. Would salmon, from their habits, humpbacks and dogs, go into one stream one year and not into that stream another year? For instance,

(Testimony of A. J. Sprague.)

the question I want to ask is this: if a stream has salmon in it one year, does it necessarily follow that it has every year? A. No; no.

Q. Would there be periods when there wouldn't be any salmon? [117]

A. Well, they don't spawn but once, so there wouldn't be any chance of their coming again.

Q. I mean, are there streams that there might be salmon in this year and then not for a number of years again? That is the question I want to get at.

The COURT.—You understand that?

A. No; I'll take that question again.

Q. Are there streams in which there would be salmon one year and perhaps no salmon again go up in that stream for a number of years?

A. Yes; that could be true.

Q. How long a period would that sometimes be?

A. We are all guessing at the cycle year of salmon. There is no authority on that. It might be four or seven years. In fact the king salmon might have a vote coming before he spawns.

Cross-examination.

(By Mr. SHOUP.)

Q. Some years salmon don't run as well as other years, too, isn't that so? A. Yes.

Q. Now, calling your attention to Lucky Cove Creek— You know where Lucky Cove creek is, do you not? A. How is that?

Q. You know where Lucky Cove creek is?

A. About where it is.

(Testimony of A. J. Sprague.)

Q. Were you ever up there?

A. I was down there taking inventories on some canneries close by.

Q. Were you ever up to the creek? A. No.
[118]

Q. You know where it is, though?

A. About where it is; yes.

Q. Now, if 3,000 salmon were up there in Lucky Cove creek and salmon eggs were found in the gravel above high-tide line, would you consider that a salmon stream?

A. That's a whole lot of fish.

Q. Well, answer my question, please.

The COURT.—Is it a salmon stream, is the question.

A. If it contained 3,000, is that it?

The COURT.—Yes.

A. Yes.

The COURT.—And if there were salmon eggs found on the ground up there.

Q. Now, if salmon eggs were found above high-tide line in the gravel of that creek and several hundred fish were found above high-tide line in the creek, in fresh water, would you consider that a salmon stream? A. No, sir.

Q. If they were spawning would you consider that a salmon stream or not? A. No, sir.

Q. How many salmon would have to go up the creek to spawn before you would consider it a salmon stream?

A. Well, there would have to be a sufficient

(Testimony of A. J. Sprague.)

number to seed the bed of the available spawning ground.

Q. Well, if several hundred were actually up there in that creek and salmon eggs were found in the gravel of that creek—

A. (Interrupting.) Several hundred eggs?

Q. Yes. Wouldn't you consider that a salmon stream?

A. No; not—No, I wouldn't consider several hundred eggs— [119]

Q. Well, if you were to discover seven hundred eggs there through a period of digging around there for a bit in the gravel—I don't mean to say that if only that many eggs were up there in the creek; I mean if that many were found just in digging around in the gravel, would you consider that a salmon stream?

A. Well, do you mean— I don't get it exactly. Do you mean they would be in the fresh water or in brackish water.

Q. In the fresh water, and in the brackish water, too, of the creek.

A. Well, I wouldn't consider that a salmon stream.

Q. Well, if it was fresh water?

A. If it was fresh water and there were 3,000 salmon in there, it would be a salmon stream.

Q. So it depends on the number of fish in there, in the fresh water, does it, as to what is a salmon stream according to your definition?

A. Well, most of the salmon streams in Alaska

(Testimony of A. J. Sprague.)

are barred by impassable falls as soon as you get away from the beach for a couple of hundred yards and they are not available salmon streams because they have no spawning grounds.

The COURT.—Well, now, look here. Just consider your mind entirely off the definition of a salmon stream. If you find 300 salmon in that stream above the ordinary line of high tide in fresh water, would that be a stream in which salmon run?

A. Yes.

The COURT.—That's what the statute says.

Mr. SHOUP.—Yes.

The COURT.—A stream in which salmon run. [120]

Redirect Examination.

(By Mr. FAULKNER.)

Q. Where do humpies spawn?

A. Usually in brackish water.

Q. In brackish water? A. Or tidal waters.

Q. Tidal waters? A. Or in the lagoons.

Mr. FAULKNER.—That's all.

TESTIMONY OF A. N. HERRALD, FOR DEFENDANT.

A. N. HERRALD, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. What is your business?

(Testimony of A. N. Herrald.)

A. Superintendent of the Pacific American Fisheries cannery at Excursion Inlet.

Q. How long have you been in the salmon canning business? A. Since 1912.

Q. In Alaska? A. Yes, entirely.

Q. Have you been in southeastern Alaska all that time?

A. No; I have been out on the Peninsula, Bering Sea.

Q. Where?

A. Out on the Penninsula and in the Bering Sea.

Q. Where were you in the year 1924?

A. I was at Excursion Inlet.

Q. Southeastern Alaska? A. Yes.

Q. Do you know the habits of dog salmon when they go into a stream? [121]

Mr. SHOUP.—We object to that unless the question is confined to the district in which the prosecution is laid in this case.

Mr. FAULKNER.—Southeastern Alaska district.

Mr. SHOUP.—Well, no.

Q. In the Ketchikan district of southeastern Alaska?

A. Well, I would think that the habits would be the same in the Ketchikan district that they are in this district, so far as I have had any chance to make any observations.

Q. Now, Mr. Herrald, your company owns a number of canneries, doesn't it? A. Yes, sir.

Q. Owns one in the Ketchikan district?

(Testimony of A. N. Herrald.)

A. They don't really own the plant, but they're operating it.

Q. Now, from your observations and your experience with dog salmon, if they go into a creek into which salmon run, about the 15th of September, would they naturally all be out of there by November 24th, or would there be some left in the creek.

Mr. SHOUP.—We object to that because this witness hasn't shown that he knows anything about salmon in the district where this prosecution is laid.

Mr. FAULKNER.—Oh, I think he has.

Mr. SHOUP.—He says his company owns a cannery down there.

The COURT.—You haven't asked him as to his knowledge.

Q. Have you had experience as cannery foreman for a number of years? A. Yes, sir.

Q. And have you had experience fishing?

A. I naturally get around to fishing. [122]

Q. With fish-traps?

A. Fish-traps and up salmon streams.

Q. How many years?

A. Well, in fact, 1912 is the first year that I got around to any salmon streams or canneries to speak of.

Q. You say that the conditions are the same with reference to the runs of salmon?

A. Well, the periods between the Ketchikan district and the Juneau district, my not having been

(Testimony of A. N. Herrald.)
in the Ketchikan district, I can only say that the habits of salmon around the Icy Straits district and along the Aleutian Peninsula, the Alaska Peninsula and the Aleutian Islands, as far west as Unimak or Umnak and in the Bering Sea, they're the same.

Q. For the same species? A. Yes.

Q. Now, would the habits of dog salmon, with reference to running into salmon streams, be the same in one district as in another? I mean the habits of salmon, not the periods of run.

A. They are in the district of which I know and have had opportunity to make observations.

Q. Now, I will ask you this question: If dog salmon are found in a stream in the middle of September in considerable numbers, would they all likely be gone by the 24th of November or would they still be in the stream?

Mr. SHOUP.—We object to the question for the reason that the witness is not qualified to testify with reference to the creek near which this trap is located, and further, he has no knowledge of the thing himself. It would be just a guess.

The COURT.—Well, I think he can answer. He has testified [123] as to the habits of salmon, that they were the same for the same species of salmon in the different districts, and that he considers the habits of salmon in the Ketchikan district would be the same as in this district, or in the districts in which he has had experience. The jury may take that into consideration.

(Testimony of A. N. Herrald.)

Q. Will you answer the question, Mr. Herrald?

A. Will I answer now?

The COURT.—Yes.

A. Why, I think there would be no salmon there in November if they entered this stream in September.

Q. Are dogs in the habit of running down there in streams later than they are in the streams—

The COURT.—Now, that is a different question. He can't tell anything about it if he doesn't know about the Ketchikan district.

Q. Do you know anything about the habits of salmon, dog salmon in going up the streams? Is there any difference between one district and another? A. Apparently not, so far as I can see.

Q. Now, how late would salmon continue to run in a stream, dog salmon?

Mr. SHOUP.—We object to that, for the reason that there is a considerable difference between different sections as to the time salmon run in them.

Mr. FAULKNER.—The witness says there's not.

The COURT.—Yes; he has testified that there is no difference in his judgment.

(Question repeated by reporter.)

A. I have known them to run in dog salmon streams until the [124] first of December.

Mr. FAULKNER.—That's all.

(Testimony of A. N. Herrald.)

Cross-examination.

(By Mr. SHOUP.)

Q. When does the dog salmon first run in the spring? A. Beg pardon?

Q. When does the—

A. (Interrupting.) Why, out in the Icy Straits district, we have an early run of dogs and they continue in small numbers through the entire season, and they are the last fish outside of the cohoes.

Q. There is another heavy run in the fall, is that not true? A. Yes, that is true.

Q. How about the humpbacks, do they all come in one school, or come two or three hundred at a time?

A. They keep stringing along, too, during the season. However, I think we figure that, so far as our fishing is concerned, we're through catching humpbacks along about the 15th of August.

Q. Is it the habit of humpback salmon to go immediately into fresh water or a spawning stream after they come from the ocean?

A. Well, I would say that they go immediately in after they come into the Straits.

Q. Isn't it a fact that they school up around the mouths of streams? A. Yes.

Q. And the same about dog salmon? A. Yes.

Q. You don't know anything about the Lucky Cove stream? A. Sir? [125]

Q. You don't know anything about the stream down there? A. No; I was never there.

Q. What time do the different runs of salmon

(Testimony of A. N. Herrald.)

come there during the year? Do you know anything about when those salmon runs take place?

A. No; I only know from hearsay, which wouldn't count in this case—from the Bureau of Fisheries regulation they're apparently ten days later, from the fact that they have made a regulation this last summer closing the season on a certain day, from the tenth of August in this district, or midnight of the 11th, whereas it is the 20th or 25th in the district below us.

Q. And the regulations were based primarily on the habits of the humpback salmon, are they?

A. I think so.

Mr. SHOUP.—We rest, your Honor.

Whereupon court adjourned until Wednesday, December 10, 1924, at ten o'clock A. M.

Wednesday, December 10, 1924.

Court met pursuant to adjournment, at 10 o'clock A. M.

Whereupon the defendant, by its counsel, presented its requested instructions to the Court.

Mr. FAULKNER.—I want to state to the Court that I notice that the sketch on the blackboard and the tracing of the War Department records have not been marked as exhibits.

The COURT.—They were introduced only for the purpose of illustration.

Mr. SHOUP.—If the Court please, counsel is willing to stipulate that they may be used as exhibits in the case. [126]

The COURT.—They may be introduced as ex-

hibits and it may be shown on the record that both counsel agreed that they be introduced as exhibits.

Mr. SHOUP.—That doesn't include the map, though.

Mr. FAULKNER.—No; not the map.

(Whereupon said tracing and sketch were received in evidence and marked Plaintiff's Exhibits Nos. 2 and 3 respectively.)

The evidence having been closed and arguments made by counsel, the Court instructed the jury as follows:

INSTRUCTIONS OF COURT TO THE JURY.

Ladies and Gentlemen of the Jury:

The defendant, the Booth Fisheries Company, is charged in two informations filed by the United States Attorney, with violations of the act of Congress of June 6, 1924, entitled "An Act for the protection of the fisheries of Alaska, and for other purposes." The first information was filed before the Court on October 16, 1924, and charges a violation of section 4 of the act.

The charge is that the Booth Fisheries Company, a corporation, at or near Lucky Cove, in the Territory of Alaska, and within the jurisdiction of this court, on the 26th day of August, 1924, in the waters of Revillagigedo Channel, between Thorn Arm and Behm Canal, in the First Division, Territory of Alaska and within the jurisdiction of this court, did then and there unlawfully fish for and take salmon for commercial purposes, by means of a fish-trap known as Booth Fisheries Company trap (license No. 21–179) within five hundred yards

of the mouth of a small unnamed creek, said creek being then and there a stream into which salmon run, contrary to the form of the statute in such cases made and provided. [127]

This section, which is section 4 of the statute, reads as follows: "That it shall be unlawful to fish for, take or kill any salmon of any species, or by any means except by hand rod, spear or gaff, in any of the creeks, streams or rivers of Alaska, or within 500 yards of the mouth of any such creek, stream or river over which the United States has jurisdiction, excepting the Karluk and Ugashik rivers."

This information charges, therefore, a violation of this section, in that the defendant, the Booth Fisheries Company, did fish for, take or kill salmon within 500 yards of the mouth of a stream in Alaska over which the United States has jurisdiction.

I.

Now, I charge you that the United States has jurisdiction over all the streams of Alaska, and, therefore, it has jurisdiction over any stream emptying into the waters of Lucky Cove, between Thorn Arm and Behm Canal, as charged in the information.

II.

Therefore, if you find from the evidence in this case, that the Booth Fisheries Company did fish for, take or kill any salmon of any species within 500 yards of the mouth of any stream in the Territory of Alaska, within the jurisdiction of this

court, over which the United States has jurisdiction, then it would be a violation of this section, and you should find the defendant guilty as charged in the information.

III.

The second information, which you are also trying (it having been agreed by counsel for the United States and counsel for the defendant that the two informations should be consolidated [128] and tried together) was filed by the United States Attorney on the fourth day of December, 1924, in which it is charged that the Booth Fisheries Company violated section 3 of the act. Section 3 is as follows: "That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish-wheel or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska, at any point where the distance from shore to shore is less than 1,000 feet,"—now, here comes the alternative under which this charge is made,—"or within 500 yards of the mouth of any creek, stream or river into which salmon run, excepting the Karluk and Ugashik rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds; and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream or river shall be taken to be a point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination."

The charging part of this information is that the Booth Fisheries Co., on the 25th day of July, in the First Division, Territory of Alaska, in waters over which the United States has jurisdiction, to wit, at or near Lucky Cove, indenting the shore of Revillagigedo Island, between Thorn Arm and Behm Canal, within 500 yards of the mouth of a small unnamed creek emptying into Lucky Cove, the said creek being then and there a stream into which salmon run, not for the purpose of fish culture, did wilfully and unlawfully erect and maintain a floating fish-trap known as Booth Fisheries Company trap (license No. 24–179), with the purpose and result of capturing salmon and preventing [129] and impeding their ascent to the spawning grounds in this creek. You will notice that the charge is for placing the trap within 500 yards of the mouth of a stream which is alleged to be a stream into which salmon run, with the result of capturing salmon and preventing and impeding their ascent to the spawning grounds in said creek.

IV.

Now, I charge you, in considering these two informations, that it is essential that you first be satisfied beyond a reasonable doubt that Lucky Cove creek, or the creek mentioned and known locally as the testimony shows, as Lucky Cove creek, is within the jurisdiction of this court, and to that end I charge you, as a matter of law, that the waters of Lucky Cove creek are within the jurisdiction of this court and you should so find.

V.

The first question to come before you, then—and it is a question common to both informations—is, Was the stream at the head of Lucky Cove a stream into which salmon run? That is a matter which you should consider from the evidence. A stream into which salmon run, according to the statute as I interpret it, is a stream into which salmon are accustomed to run not at any particular time, but one into which salmon run at one interval or at another interval.

VI.

If you should find that the stream known as and called Lucky Cove creek is a stream into which salmon run, then the next question which is common to both informations, is, Was the trap of the Booth Fisheries Company within 500 yards of [130] the mouth of such stream?

VII.

To this end, I charge you that the mouth of a stream emptying into tide water, is the point of place where the waters of the stream meet tide water at mean low tide. It is not where the waters of the stream meet tide water at high tide, but where the waters of the stream meet tide water at mean—that is, the average—low tide.

VIII.

If you should find that the stream known as Lucky Cove creek is a stream into which salmon run, as I have defined it to you, and you should further find that the trap was erected and maintained within 500 yards of the mouth of the stream

known as Lucky Cove creek, then you will consider whether or not the Booth Fisheries Company erected, maintained or kept such floating trap on the 25th of July and did fish for and take salmon for commercial purposes by means of such fish-trap on the 26th of July, and continuously from that time to and including the 20th day of August, 1924.

IX.

I charge you, however, that it is not necessary that you should find that the fishing was continuous from the 26th day of July to the 20th day of August, 1924. Any fishing during that period by a fish-trap within 500 yards of the mouth of a stream into which salmon run would be a violation of the statute. And if you should find that the fishing was done by the defendant, the Booth Fisheries Company, within 500 yards of the mouth of Lucky Cove creek and that such creek is a stream or creek [131] into which salmon run, on any one day, then you should find the defendant guilty as charged in the above information. But if you should have a reasonable doubt from the evidence or because of a lack thereof, whether the stream is a stream into which salmon run or whether the trap was within 500 yards of the mouth of the stream, or whether the Booth Fisheries Company fished for or caught salmon for commercial purposes on any day named in the information, then you will find the defendant not guilty as to the first information.

X.

As to the second information, the defendant is charged with unlawfully erecting and maintaining a floating fish-trap, with the purpose or result of capturing salmon and preventing and impeding their ascent to the spawning grounds in said creek. As to this information, as I have stated to you, the two requisites to enable the prosecution to obtain a verdict against the defendant are whether or not the stream is a stream into which salmon run, and, second, whether or not the trap alleged to have been maintained by the defendant was maintained within 500 yards of the mouth of the stream, as I have defined it to you. A further requisite of proof on the part of the United States is whether or not such trap was maintained with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds in said creek. In order to determine this, you will consider whether or not there were any spawning grounds in said creek, and whether the fish-trap was erected and maintained with the result of capturing salmon and preventing and impeding their ascent to the spawning grounds in said creek, if you find there were spawning grounds in said creek. [132]

XI.

A further question is whether there were any markers on that creek. I charge you that that is not material as to either of these informations. That clause in section 3 reading, "For the purposes of this section, the mouth of such creek, stream or

river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination," is only for the purpose of fixing the mouth of the creek when and as determined by the Secretary of Commerce. The testimony herein shows that the Secretary of Commerce had not fixed the mouth of the creek nor marked it, in which event it becomes a question of fact as to where the mouth of the creek is, to be determined by the jury in each particular case from the evidence and from the instructions given them by the Court. If, however, the Secretary of Commerce should determine where the mouth of the creek is and should mark it, then the Court would be bound by it; but, not having done so, the Court is not bound by it.

XII.

Now, as to the question of notice to the defendant, that is not a material question in this case. Each offense in this case is what in law is called a *malum prohibitum*. The question of the good faith of the defendant does not arise in this case at all. The law provides that the defendant shall do certain things and the defendant is supposed to have notice of what the law provides. He is presumed to know the law, and where an act is prohibited which is not in itself immoral or wrong, it is termed a *malum prohibitum* and the defendant must do as the law requires him to do, whether his intention was to violate the law or not. [133]

XIII.

In this case, which is a criminal case, of course,

the defendant is presumed to be innocent of the crime with which it is charged. This presumption of innocence attends the defendant throughout the trial of the case until the evidence satisfies the jury, beyond a reasonable doubt, of defendant's guilt.

XIV.

A reasonable doubt is a doubt based upon the evidence. It is not a captious doubt or a doubt not based upon the evidence, but is a doubt which arises in the minds of the jury after a careful consideration and comparison of all the evidence and is such a doubt as would cause one to hestitate or pause in the more important affairs of his own life.

XV.

You are the sole judges of the evidence in the case. When you retire to your jury-room, you should carefully consider all the evidence and from the evidence find the facts of the case and apply the law as given by the Court to the facts and render your verdict accordingly. You are not bound to find in conformity with the declarations of any number of witnesses which do not satisfy your minds against a less number or against a presumption satisfying your minds.

XVI.

Any witness who has testified falsely in one part of his testimony may be distrusted in other parts. In determining the credibility of a witness and the weight to be given to his evidence, you may take into consideration the interest, if any, [134]

shown by the witness in the result of the action, his apparent bias, candor and so forth, the reasonableness of his story, how far his testimony may be corroborated by other facts and circumstances in the case and give to each witness' testimony just such credit as you deem it is entitled to.

XVII.

You are to take this case and decide it without bias or prejudice one way or the other and bring in your verdict upon the evidence and the instructions which I have given you. You should consider the evidence carefully, for if the Court has erred in his instructions, there is always a remedy by appeal to a higher court by the party injured, but if the jury does not find according to the evidence, there is no appeal from it and your verdict is final.

XVIII.

Counts two and three in the second information were dismissed by the Court. You should not consider those counts in the information given to you by the clerk.

You will have two forms of verdict, in blank, one finding the defendant guilty or not guilty in cause No. 1749, and one finding the defendant guilty or not guilty in No. 1778.

When you retire to your jury-room, you will elect one of your number foreman and when you have arrived at a verdict in both cases, you will return such verdict into the courtroom in the presence of you all.

Whereupon, in open court and in the presence of the jury, the defendant, by its counsel, took the following exceptions, which were allowed:

Mr. FAULKNER.—The defendant excepts to the refusal of the [135] Court to give instruction No. 2, requested by the defendant, and instruction No. 3, requested by the defendant. The defendant also excepts to the instruction in which the Court stated, in substance, as follows: that the mouth of the creek or stream is the place where the waters of the stream meet salt water at mean low tide. Defendant excepts to the instruction given, in substance and effect, that it is not material that there were no markers to determine or mark the mouth of the stream; and to the instruction that no notice was required to be given the defendant and that the question of the good faith of the defendant does not arise at all.

And thereupon the jury retired for the consideration of its verdict.

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation.

INSTRUCTIONS REQUESTED BY DEFENDANT.

II.

You are instructed that section 3 of the act of Congress of June 6, 1924, under which this prosecution is brought, provides as follows:

Sec. 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish-wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream or river into which salmon run, excepting the Karluk and Ugashik rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds, and the Secretary [136] of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive

or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance.

You are instructed that in this case, unless it has been shown that the Secretary of Commerce, or someone under his direction, determined and marked the point designated as the mouth of the stream in question, you must find the defendant not guilty.

III.

You are instructed that in order to find the defendant guilty, it is necessary for the Government to prove that the stream in question was a stream or creek into which salmon ran prior to August 20, 1924; and if the Government has not proved that salmon ran into this stream, or in other words, that this was a creek into which salmon ran between the 3d day of July and the 20th day of August, 1924, your verdict must be not guilty.

In the District Court of the United States for the District of Alaska, Division Number One.

No. 1778–B.

THE UNITED STATES OF AMERICA

vs.

THE BOOTH FISHERIES COMPANY, a Corporation.

VERDICT.

Special Nov. Term, 1924.

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the information in 1778–B, and in so doing recommend leniency of the Court.

Dated at Juneau, Alaska, this 10th day of December, 1924. [137]

J. E. BARRAGAR,
Foreman.

Filed in the District Court, Territory of Alaska, First Division. Dec. 10, 1924. John H. Dunn, Clerk.

Entered Court Journal No. One, page 273.

In the District Court for the District of Alaska, Division Number One.

No. 1749–B.

THE UNITED STATES OF AMERICA

vs.

THE BOOTH FISHERIES CO., a Corporation.

VERDICT.

Special Nov. Term, 1924.

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the information in 1749–B, and in so doing recommend leniency by the Court.

Dated at Juneau, Alaska, this 10th day of December, 1924.

J. E. BARRAGAR,
Foreman.

Filed in the District Court, Territory of Alaska, First Division. Dec. 10, 1924. John H. Dunn, Clerk.

Entered Court Journal No. One, page 273.

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation.

MOTION FOR A NEW TRIAL.

Comes now the defendant, by its attorney, and moves the Court to set aside the verdict of the jury found and filed herein on December 10, 1924, and grant the defendant a new trial upon the following grounds, to wit: [138]

I.

The Court erred in sustaining the objection to the question propounded to the witness A. McCue, in which he was asked whether he had seen seine boats fishing at Lucky Cove between the trap men-

tioned in the information herein and the mouth of the stream.

II.

The Court erred in instructing the jury that the mouth of the creek or stream is the place where the waters of the stream meet tide water at mean low tide.

III.

The Court erred in instructing the jury in effect that it is not material whether there were any markers placed at the mouth of Lucky Cove stream by the Secretary of Commerce to determine the mouth of such stream.

IV.

The Court erred in instructing the jury that no notice is required to be given to the defendant, and that the question of good faith of defendant does not arise at all.

V.

The Court erred in refusing to give to the jury instruction No. 2 as requested by the defendant.

VI.

The Court erred in refusing to give to the jury instruction No. 3 as requested by the defendant.

H. L. FAULKNER,
Attorney for Defendant.

Filed in the District Court, Territory of Alaska, First Division. Dec. 11, 1924. John H. Dunn, Clerk. By W. B. King, Deputy. [139]

But the Court overruled the defendant's motion

for a new trial, to which ruling of the Court the defendant excepted and was allowed an exception.

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS.

United States of America,
Territory of Alaska,—ss.

I hereby certify that I am the Judge by and before whom the above-entitled cause was tried and that the foregoing bill of exceptions is a full, true and correct account and transcript of the evidence and proceedings had therein, and that it contains the evidence and all the evidence heard or considered at said trial.

I also certify that the said bill of exceptions was duly presented and filed within the time allowed by law and the rules of this Court.

Wherefore, said bill of exceptions being true and correct, I do now, within the time allowed by law and the rules of this Court, allow and settle same, and order it to be filed and to become a part of the records of this cause.

Dated at Juneau, Alaska, this 14th day of February, 1925.

THOS. M. REED,
District Judge.

In the District Court for the District of Alaska Division Number One, at Juneau.

1749-B and 1778-B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

JUDGMENT AND SENTENCE.

These actions, numbered 1749-B and 1778-B, consolidated for [140] trial, came on regularly for trial on December 9, 1924, A. G. Shoup, United States Attorney, and H. D. Stabler, Special Assistant United States Attorney, appearing as counsel for the United States of America, and H. L. Faulkner, esquire, appearing for the defendant Booth Fisheries Company. A jury of twelve persons was regularly impaneled and sworn to try said actions, and witnesses on the part of the United States of America and Booth Fisheries Company, defendant, were duly sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the court, the jury retired to consider their verdict and subsequently returned into court with the following verdicts:

United States of America, District of Alaska.

In the District Court of the United States for the District of Alaska, Division Number One.

No. 1749–B.

UNITED STATES OF AMERICA

vs.

THE BOOTH FISHERIES COMPANY, a Corporation.

VERDICT.

Special Nov. Term, 1924.

We, the jury impaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the information in 1749–B, and in so doing recommend leniency by the Court.

Dated at Juneau, Alaska, this 10th day of December, 1924.

J. E. BARRAGAR,
Foreman.

United States of America, District of Alaska.

In the District Court of the United States for the District of Alaska, Division Number One.

No. 1778–B.

THE UNITED STATES OF AMERICA

vs.

THE BOOTH FISHERIES COMPANY, a Corporation.

VERDICT.

Special Nov. Term, 1924.

We, the jury impaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the information in No. 1778–B and in so doing recommend leniency by the Court.

Dated at Juneau, Alaska, this 10th day of December, 1924.

J. E. BARRAGAR,
Foreman. [141]

WHEREFORE it is the judgment of the Court that the defendant, Booth Fisheries Company, a corporation, is guilty of the crime of illegal fishing by unlawfully fishing for and taking salmon for commercial purposes and not for local food requirements or for use as dog feed, by means of a fish-trap, known as Booth Fisheries Company's trap, license No. 24–179, within five hundred yards of the mouth of a small unnamed creek, said creek being then and there a stream into which salmon run, at or near Lucky Cove, indenting the shore of Revillagigedo Island between Thorn Arm and Behm Canal, in the waters of Revillagigedo Channel, in the First Division, District of Alaska, on the 26th day of July, 1924, continuously to and including the 20th day of August, 1924, as charged in the information filed in the within entitled court and cause No. 1749–B, and it is the sentence of the Court that said Booth Fisheries Company, a corporation, pay a fine of

Eleven Hundred ($1100) Dollars; and it is the judgment of the Court that the defendant, Booth Fisheries Company, a corporation, is guilty of the crime of unlawfully erecting and maintaining a floating fish-trap known as Booth Fisheries Company's trap, license number 24–179, with the purpose and result of capturing salmon and preventing and impeding their ascent to the spawning grounds within 500 yards of a certain creek, unnamed, emptying into Lucky Cove, into which said creek salmon run, in the First Division, District of Alaska, on the 25th day of July, 1924, as charged in the information filed in the above-entitled court in cause No. 1778–B, and it is the sentence of the Court that said Booth Fisheries Company, a corporation, in addition to the fine hereinbefore imposed in case No. 1749–B, pay a further fine of Eight Hundred ($800) Dollars [142] in cause No. 1778–B; and it is the further sentence of the Court that said Booth Fisheries Company pay the costs of cases Nos. 1749–B and 1778–B.

Dated at Juneau, Alaska, December 24, 1924.

THOS. M. REED,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division. Dec. 24, 1924. John H. Dunn, Clerk.

Entered Court Journal Vol. One, page 300.

In the District Court for the District of Alaska,
Division Number One, at Juneau,

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation.

MOTION FOR STAY OF EXECUTION AND FOR ORDER ALLOWING TIME WITHIN WHICH TO FILE BILL OF EXCEPTIONS.

Comes now the Booth Fisheries Company, defendant, and moves the Court to allow it sixty (60) days from December 24, 1924, within which to file the bill of exceptions herein on appeal and to grant it a stay of execution during said period.

H. L. FAULKNER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division. Jan. 3, 1925. John H. Dunn, Clerk. By N. B. Cook, Deputy. [143]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. *1479* and 1778–B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation.

BOND FOR STAY OF EXECUTION.

KNOW ALL MEN BY THESE PRESENTS: That we, Booth Fisheries Company, a corporation, doing business in Alaska, as principal, and B. M. Behrends and W. G. Johnson, both of Juneau, Alaska, as sureties, are held and firmly bound unto the United States of America in the sum of Two Thousand Five Hundred Dollars ($2,500), to be paid to the said United States of America, for which payment well and truly to be made, we bind ourselves and each of us and each of our heirs, executors, administrators, successors and assigns jointly and severally firmly by these presents.

Signed and sealed this January 2, 1925.

The condition of the above obligation is such that whereas a judgment was entered on the 26th day of December, 1924, in the above-entitled court and cause in favor of the said United States of America, and against the defendant, Booth Fisheries Company, a corporation, in the sum of Nineteen Hundred Dollars ($1,900) and costs, for vio-

lation of Sections III and IV of the act of Congress approved June 6, 1924, for the regulation and protection of the fisheries of Alaska; and whereas the said defendant desires to sue out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment, and whereas an order has been issued to stay execution on said judgment for a period of sixty days from December 24, 1924, the [144] day when said judgment was pronounced.

NOW, THEREFORE, if the above-bounden Booth Fisheries Company, a corporation, shall prosecute said writ of error to effect and answer all costs and damages which might accrue to said United States of America by virtue of said stay of execution, then this obligation to be void, otherwise the same to remain in full force and effect.

BOOTH FISHERIES COMPANY, a Corporation.

By H. L. FAULKNER,
Its Agent and Attorney,
Principal.

B. M. BEHRENDS,
W. G. JOHNSON,
Sureties.

United States of America,
Territory of Alaska,—ss.

We, the undersigned, B. M. Behrends and W. G. Johnson, whose names are subscribed to the foregoing bond as sureties thereon, being first duly sworn, depose and say: That we are each worth the sum of Two Thousand Five Hundred Dollars

($2,500) over and above all our just debts and and liabilities, exclusice of property exempt from execution, and that neither of us is an attorney, nor counselor-at-law, clerk in any court, nor other officer of any court.

B. M. BEHRENDS.
W. G. JOHNSON.

Subscribed and sworn to before me this third day of January, 1925.

[Seal] J. F. MULLEN,
Notary Public for Alaska.

My commission expires Dec. 4, 1927.

Approved this 3d day of January, 1925.

THOS. M. REED,
Judge. [145]

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division. Jan. 3, 1925. John H. Dunn, Clerk. By N. B. Cook, Deputy.

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1749-B and 1778-B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation.

ORDER ALLOWING TIME TO FILE BILL OF EXCEPTIONS AND GRANTING STAY OF EXECUTION.

This matter coming on for hearing this third day of January, 1925, upon the motion of the defendant to be granted sixty (60) days within which to file bill of exceptions herein, and granting it a stay of execution during said time.

IT IS HEREBY ORDERED that the defendant is granted sixty (60) days from December 24, 1924, within which to file its bill of exceptions herein; and

IT IS FURTHER ORDERED that execution herein be stayed until the expiration of said period on the condition that the defendant file herein a bond upon said stay of execution in the sum of Twenty-five Hundred Dollars ($2500).

Done in open court this 3d day of January, 1925.

THOS. M. REED,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, First Division. Jan. 3, 1925. John H. Dunn, Clerk. By N. B. Cook, Deputy.

Entered Court Journal No. One, page 310, [146]

United States of America, District of Alaska.

In the District Court of the United States for the District of Alaska, Division Number One.

No. 1749–B.

THE UNITED STATES OF AMERICA

vs.

THE BOOTH FISHERIES CO., a Corporation.

VERDICT.

Special Nov. Term, 1924.

We, the jury impaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the information in 1749–B and in so doing recommend leniency by the Court.

Dated at Juneau, Alaska, this 10th day of December, 1924.

J. E. BARRAGAR,
Foreman.

Filed in the District Court, Territory of Alaska, First Division. Dec. 10, 1924. John H. Dunn, Clerk. By ————, Deputy.

Entered Court Journal No. One, page 273. [147]

United States of America, District of Alaska.

In the District Court of the United States for the District of Alaska, Division Number One.

No. 1778–B.

THE UNITED STATES OF AMERICA

vs.

THE BOOTH FISHERIES CO., a Corp.

VERDICT.

Special Nov. Term, 1924.

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the information in #1778–B, and in so doing recommend leniency by the Court.

Dated at Juneau, Alaska, this 10th day of Dec., 1924.

J. E. BARRAGAR,
Foreman.

Filed in the District Court, Territory of Alaska, First Division. Dec. 10, 1924. John H. Dunn, Clerk. By ————, Deputy.

Entered Court Journal No. One, page 273. [148]

In the District Court for the District of Alaska, Division No. One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation.

MOTION FOR A NEW TRIAL.

Comes now the defendant by its attorney and moves the Court to set aside the verdict of the jury found and filed herein on December 10th, 1924, and grant the defendant a new trial upon the following grounds, to wit:

1.

The Court erred in sustaining the objection to the question propounded to the witness, A. A. McCue, in which he was asked whether he had seen seine boats fishing at Lucky Cove between the trap mentioned in the information herein and the mouth of the stream.

2.

The Court erred in instructing the jury that the mouth of the creek or stream is the place where the waters of the stream meet tide water at mean low tide.

3.

The Court erred in instructing the jury in effect that it is not material whether there were any markers placed at the mouth of Lucky Cove stream

by the Secretary of Commerce to determine the mouth of such stream.

4.

The Court erred in instructing the jury that no notice is required to be given to the defendant, and that the question of good faith of defendant does not arise at all. [149]

5.

The Court erred in refusing to give to the jury instruction No. 2 as requested by the defendant.

6.

The Court erred in refusing to give to the jury instruction No. 3 as requested by the defendant.

H. L. FAULKNER,
Attorney for Defendant.

Copy received.

A. G. SHOUP,
U. S. Atty.

Filed in the District Court, Territory of Alaska, First Division. Dec. 11, 1924. John H. Dunn, Clerk. By ————, Deputy. [150]

In the District Court for the District of Alaska, Division Number One, at Juneau.

1749–B and 1778–B.

UNITED STATTS OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

ORDER OVERRULING MOTION FOR NEW TRIAL.

And now, to wit, on December 20, 1924, this matter came before the Court for hearing on Booth Fisheries Company's motion for new trial, which said motion was heretofore, to wit, on December 11, 1924, filed in the above-entitled court and cause; A. G. Shoup, United States Attorney, and H. D. Stabler, Special Assistant United States Attorney, appeared for the United States of America, and H. L. Faulkner, Esq., appeared for the defendant; and the matter being heard by the Court, and the law and the premises being by the Court fully understood and considered, IT IS HEREBY ORDERED that said motion for new trial be, and it hereby is, OVERRULED; to which ruling of the Court defendant excepted and said exception is allowed.

THOS. M. REED,
District Judge.

Filed in the District Court, Territory of Alaska, First Division. Dec. 22, 1924. John H. Dunn, Clerk. By ————, Deputy.

Entered Court Journal No. One, page 285. [151]

In the District Court for the District of Alaska, Division Number One, at Juneau.

1749–B and 1778–B.

UNITED STATES OF AMERICA

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

JUDGMENT AND SENTENCE.

These actions, numbered 1749–B and 1778–B, consolidated for trial, came on regularly for trial on December 9, 1924, A. G. Shoup, United States Attorney, and H. D. Stabler, Special Assistant United States Attorney, appearing as counsel for the United States of America, and H. L. Faulkner, Esq., appearing for the defendant, Booth Fisheries Company. A jury of twelve persons was regularly impaneled and sworn to try said actions, and witnesses on the part of the United States of America and Booth Fisheries Company, defendant, were duly sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider their verdict and subsequently returned into court with the following verdicts:

"United States of America, District of Alaska.

In the District Court of the United States for the District of Alaska, Division Number One.

No. 1749–B.

THE UNITED STATES OF AMERICA

vs.

THE BOOTH FISHERIES CO., a Corporation.

VERDICT.

Special Nov. Term, 1924.

We the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the information in 1749–B and in so doing recommend leniency by the Court.

Dated at Juneau, Alaska, this 10th day of December, 1924.

J. E. BARRAGAR,
Foreman." [152]

"United States of America, District of Alaska.

In the District Court of the United States for the District of Alaska, Division Number One.

No. 1778–B.

THE UNITED STATES OF AMERICA

vs.

THE BOOTH FISHERIES CO., a Corporation.

VERDICT.

Special Nov. Term, 1924.

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the information in No. 1778–B and in so doing recommend leniency by the Court.

Dated at Juneau, Alaska, this 10th day of Dec. 1924.

J. E. BARRAGAR,
Foreman."

WHEREFORE, it is the judgment of the court that the defendant, Booth Fisheries Company, a corporation, is guilty of the crime of illegal fishing by unlawfully fishing for and taking salmon for commercial purposes and not for local food requirements or for use as dog feed, by means of a fish-trap, known as Booth Fisheries Company's trap, license No. 24–179, within five hundred yards of the mouth of a small unnamed creek, said creek being then and there a stream into which salmon run, at or near Lucky Cove, indenting the shore of Revillagigedo Island between Thorn Arm and Behm Canal, in the waters of Revillagigedo channel, in the First Division, District of Alaska, on the 26th day of July, 1924, continuously to and including the 20th day of August, 1924, as charged in the information filed in the within-entitled court and cause No. 1749–B, and it is the sentence of the Court that said Booth Fisheries Company, a corporation, pay a fine of Eleven Hundred ($1100.00) Dollars; and it is the judgment of the

Court that the defendant, Booth Fisheries Company, a corporation, is guilty of the crime of unlawfully erecting and maintaining a floating fish-trap known as Booth Fisheries Company's trap, license number 24–179, with the purpose and result of capturing salmon and preventing and impeding their ascent to the spawning grounds, within 500 yards of a certain creek, unnamed, emptying into Lucky Cove, into which said creek salmon run, in the First Division, District of Alaska, on the 25th day of July, 1924, as charged in the information filed in the above-entitled court in cause [153] No. 1778–B, and it is the sentence of the Court that said Booth Fisheries Company, a corporation, in addition to the fine hereinbefore imposed in case No. 1749–B, pay a further fine of Eight Hundred Dollars ($800.00) Dollars in cause No. 1778–B; and it is the further sentence of the Court that said Booth Fisheries Company pay the costs of cases No. 1749–B and 1778–B.

Dated at Juneau, Alaska, December 24, 1924.

THOS. M. REED,

District Judge.

Entered Court Journal No. One, page 300.

Filed in the District Court, Territory of Alaska, First Division. Dec. 24, 1924. John H. Dunn, Clerk. By ————, Deputy. [154]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

ASSIGNMENTS OF ERROR.

Comes now the above-named defendant and files the following assignments of error upon which it will rely in the prosecution of the writ of error in the above-entitled cause from the judgment and proceedings had by this Honorable Court, which said judgment was signed and entered in the above-entitled cause on December 24th, 1924.

I.

The District Court erred in overruling the objection of the defendant to the question propounded to the witness, Iver N. Stensland, by the United States Attorney, as follows:

> "Now, what was the effect of this trap being in this position with reference to salmon approaching the stream."

II.

The District Court erred in sustaining the objection to the question propounded by the defendant's counsel to the witness, Iver Thue, as follows:

> "Did you see at any of those times any seine fishermen fishing between the trap and the mouth of the creek."

III.

The District Court erred in giving Instruction No. VII to the jury, which reads as follows:

> "To this end, I charge you that the mouth of a stream emptying into tide water, is the point or place [155] where the waters of the stream meet tide water at mean low tide. It is not where the waters of the stream meet tide water at high tide, but where the water of the stream meet tide water at mean—that is, the average—low tide."

IV.

The Court erred in giving Instruction No. XI to the jury which is as follows:

> "A further question is whether there were any markers on that creek. I charge you that that is not material as to either of these informations. That clause in section 3 reading, 'For the purposes of this section, the mouth of such creek, stream or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination,' is only for the purpose of fixing the mouth of the creek when and as determined by the Secretary of Commerce. The testimony herein shows that the Secretary of Commerce had not fixed the mouth of the creek nor marked it, in which event it becomes a question of fact as to where the

mouth of the creek is, to be determined by the jury in each particular case from the evidence and from the instructions given them by the court. If, however, the Secretary of Commerce should determine where the mouth of the creek is and should mark it, then the court would be bound by it; but, not having done so, the court is not bound by it."

V.

The District Court erred in giving Instruction No. XII which reads as follows:

"Now, as to the question of notice to the defendant, that is not a material question in this case. Each offense in this case is what in law is called a *malum prohibitum.* The question of the good faith of the defendant does not arise in this case at all. The law provides that the defendant shall do certain things and the defendant is supposed to have notice of what the law provides, He is presumed to know the law, and where an act is prohibited which is not in itself immoral or wrong, it is termed a *malum prohibitum* and the defendant must do as the law requires him to do, whether his intention was to violate the law or not."

VI.

The Court erred in refusing to give Instruction No. II requested by defendant, which intruction reads as follows:

"You are instructed that Section 3 of the Act of Congress of June 6, 1924, under which this prosecution is brought, provides as follows:

" 'Section 3. That it shall be unlawful to erect or [156] maintain any dam, barricade, fence, trap, fish-wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream, or river into which salmon run, excepting the Karluk and Ugashik rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream or river shall be taken to be the point determined as such by the Secretary of Commerce and marked in accordance with this determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance.'

"You are instructed that in this case, unless it has been shown that the Secretary of Commerce, or someone under his direction, determined and marked the point designated as the mouth of the stream in question, you must find the defendant not guilty."

VII.

The Court erred in refusing to give to the jury Instruction No. III requested by defendant, which instruction reads as follows:

"You are instructed that in order to find the defendant guilty, it is necessary for the Government to prove that the stream in question was a stream or creek into which salmon ran prior to August 20, 1924; and if the Government has not proved that salmon ran into this stream, or in other words, that this was a creek into which salmon ran between the 3d day of July and the 20th day of August, 1924, your verdict must be not guilty."

VIII.

The Court erred in overruling the defendant's motion for a new trial.

Dated at Juneau, Alaska, this 14th day of February, 1925.

H. L. FAULKNER,
Attorney for Defendant.

Copy of the foregoing assignments of error received this 14th day of February, 1925, and service admitted.

LESTER O. GORE,
Asst. United States Attorney.

Filed in the District Court, Territory of Alaska, First Division. Feb. 14, 1925. John H. Dunn, Clerk. By ————, Deputy. [157]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

PETITION FOR WRIT OF ERROR.

To the Honorable THOMAS M. REED, Judge of the Above-entitled Court:

The above-named defendant, Booth Fisheries Company, a corporation, feeling itself aggrieved by the verdict of the jury rendered herein on December 10th, 1924, and the judgment and sentence thereon rendered in this Court on December 24, 1924, whereby the defendant, Booth Fisheries Company, was adjudged guilty of the crime of illegal fishing in violation of Section 264, Compiled Laws of Alaska as amended on June 6th, 1924, and regulations thereunder, and of Section 3 of the Act of June 6th, 1924, by unlawfully fishing for and taking salmon by means of a fish-trap within 500 hundred yards of the mouth of a small

unnamed creek at Lucky Cove, Alaska, and sentenced on December 24th, 1924, by the Judge of this court to pay a fine of Nineteen Hundred Dollars ($1900.00) and costs.

Comes now the defendant and petitions this Honorable Court and prays the Court to allow it a writ of error from the Honorable United States Circuit Court of Appeals for the Ninth Circuit pursuant to law in such cases provided; also that an order be made herein staying the proceedings and execution in such case until further order of the United States Circuit Court of Appeals, and pending the prosecution of said writ of error; and that the Court shall fix the amount of security which the defendant shall give as a supersedeas [158] to said judgment on such writ of error.

BOOTH FISHERIES COMPANY, a Corporation.

By H. L. FAULKNER,
Its Agent and Attorney.

By H. L. FAULKNER,
Attorney for Defendant.

Service admitted February 14th, 1925.

LESTER O. GORE,
Asst. U. S. Attorney.

Filed in the District Court, Territory of Alaska, First Division. Feb. 14, 1925. John H. Dunn, Clerk. By ————, Deputy. [159]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

ORDER ALLOWING WRIT OF ERROR AND FIXING SUPERSEDEAS BOND.

This cause coming on to be heard in open court this 14th day of February, 1925, and the Court having examined the petition for writ of error herein and having heard counsel for the United States and for the defendant,

IT IS ORDERED that the writ of error be allowed in this case and the amount of supersedeas and costs bond to be filed herein be fixed at the sum of $2500.00.

Done in open court this 14th day of February, 1925.

THOS. M. REED,

Judge.

Copy received February 14th, 1925.

LESTER O. GORE,

, Asst. U. S. Attorney.

Filed in the District Court, Territory of Alaska, First Division. Feb. 14, 1925. John H. Dunn, Clerk. By ————, Deputy.

Entered Court Journal No. 1, page 349. [160]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BOOTH FISHERIES COMPANY, a Corporation,
Defendant.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, Booth Fisheries Company, a corporation, the above-named defendant, as principal, and Guy McNaughton and Geo. E. Cleveland, all of Juneau, Alaska, as sureties, are held and firmly bound unto the United States of America in the penal sum of $2500.00 for which payment, well and truly to be made, we bind ourselves, and each of us, and our heirs, executors, administrators and successors, jointly and severally firmly by these presents.

Signed and sealed at Juneau, Alaska, February 14th, 1925.

The condition of the above obligation is such that whereas the above-named principal and defendant, Booth Fisheries Company, a corporation, is about to sue out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-

entitled court rendered in the District Court for the District of Alaska at Juneau, Alaska, on December 24th, 1924, and entered and made herein on December 24, 1924, whereby and by the terms of which the said defendant, Booth Fisheries Company, a corporation was sentenced to pay a fine of Nineteen Hundred Dollars ($1900.00) for the crime mentioned in said judgment and sentence.

NOW, THEREFORE. the condition of this obligation is such that if the said defendant, Booth Fisheries Company, a corporation, shall [161] prosecute said writ of error to effect, and answer all costs and damages, if it shall fail to make good its plea, and shall at all times render itself amenable to the orders and process of this Court, or the United States Circuit Court of Appeals for the Ninth Circuit, and render itself in execution if the judgment of this Court is affirmed, or any judgment of this Court in said proceedings, or said Appellate Court, or any court, then this obligation shall be void; otherwise to remain in full force and effect.

BOOTH FISHERIES COMPANY, a Corporation.

By H. L. FAULKNER,
Its Agent and Attorney,
Principal.

GUY McNAUGHTON,
GEO. E. CLEVELAND,
Sureties.

Taken and acknowledged before me this 14th day of February, 1925.

[Court Seal] JOHN H. DUNN,

Clerk of the District Court, District of Alaska, Division No. One.

Filed in the District Court, Territory of Alaska, First Division. Feb. 14, 1925. John H. Dunn, Clerk. By ————, Deputy. [162]

United States of America,
Territory of Alaska,—ss.

We, the undersigned, Guy McNaughton and Geo. E. Cleveland whose names are signed to the foregoing bond, being first severally duly sworn, each for himself and not one for the other, depose and say, that we are residents of the First Judicial Division, Territory of Alaska, and not counsellors-at-law, nor attorneys, marshals, deputy marshals, clerks of any court, nor other officers of any court; and that we are each worth the sum of $2500.00 over and above all our just debts and liabilities and exclusive of property exempt from execution.

GUY McNAUGHTON.

GEO. E. CLEVELAND.

Subscribed and sworn to before me at Juneau, Alaska, this 14th day of February, 1925.

[Court Seal] JOHN H. DUNN,

Clerk of the District Court, District of Alaska, Division No. 1.

Approved to operate as supersedeas from the filing thereof.

THOS. M. REED,
Judge.

Copy received February 14, 1925.

LESTER O. GORE,
Asst. U. S. Attorney. [163]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BOOTH FISHERIES COMPANY, a Corporation,
Defendant.

WRIT OF ERROR.

The President of the United States, to the Honorable THOMAS M. REED, Judge of the District Court for the District of Alaska, Division Number One at Juneau, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea in said District Court before you, between the United States of America and Booth Fisheries Company, a corporation, manifest error hath happened to the great prejudice and damage of the defendant,

Booth Fisheries Company, a corporation, as is stated and appears in the petition herein.

We, being willing that error, if any hath happened, should be duly corrected and full and speedy justice be done to the parties in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly you send the record and the proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, together with this writ, so that you have the same before the Court on or before thirty days from the date hereof; that the record and proceedings aforesaid being inspected, the Circuit Court of Appeals may cause [164] further to be done therein to correct those errors what of right and according to the laws and customs of the United States ought to be done or should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, and the seal of the District Court of Alaska, Division Number One, affixed at Juneau this 14th day of February, 1925.

[Seal] JOHN H. DUNN,
Clerk.

Allowed:

THOS. M. REED,
Judge.

Copy received and service admitted this February 14th, 1925.

LESTER O. GORE,
Asst. U. S. Attorney.

Filed in the District Court, Territory of Alaska, First Division. Feb. 14, 1925. John H. Dunn, Clerk. By ————, Deputy. [165] ,

---

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1749-B and 1778-B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to A. G. Shoup, United States Attorney for the First Division, District of Alaska, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the District Court for the District of Alaska, Division No. One, at Juneau, Alaska, wherein the Booth Fisheries Company is plaintiff in error, and the United States is defend-

ant in error, then and there to show cause, if any there be, why the said judgment in said case, and in said writ of error mentioned should not be corrected and speedy justice done in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 14th day of February, 1925.

THOS. M. REED,
Judge.

Service of foregoing citation admitted this 14th day of February, 1925.

LESTER O. GORE,
Asst. U. S. Attorney.

Filed in the District Court, Territory of Alaska, First Division. Feb. 14, 1925. John H. Dunn, Clerk. By ——————, Deputy.

Entered Court Journal No. 1, pages 349 350. [166]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Nos. 1749–B and 1778–B.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BOOTH FISHERIES COMPANY, a Corporation,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court, Juneau, Alaska.

You will please make up a transcript of the record in the above-entitled cause, and include therein the following papers, to wit:

1. Information in cause No. 1749–B.
2. Information in cause No. 1778–B.
3. Order consolidating actions No. 1749–B and 1778–B for trial.
4. Bill of exceptions.
5. Verdict.
6. Motion for new trial.
7. Order overruling motion for new trial.
8. Judgment.
9. Assignments of error.
10. Petition for writ of error.
11. Order allowing writ of error.
12. Bond on writ of error.
13. Writ of error.
14. Citation on writ of error.
15. This praecipe.
16. Exhibits 1, 2 and 3 introduced upon the trial by plaintiff. [167]
17. Order directing transmission of original exhibits.

—said transcript to be prepared in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit; and please forward the same to the Clerk of the said Circuit Court of Appeals for the Ninth Circuit in accordance with said rules.

Dated at Juneau, Alaska, February 14th, 1925.

H. L. FAULKNER,

Attorney for Defendant.

Filed in the District Court, Territory of Alaska, First Division. Feb. 14, 1925. John H. Dunn, Clerk. By ————, Deputy. [168]

PLAINTIFF'S EXHIBIT No. 1.

NORTHWESTERN FISHERIES COMPANY

Booth Fisheries Company, Owner.

General Offices:

600 Marion Building.

Seattle, Washington.

February 16th, 1924.

Clerk of the U. S. District Court, Division No. 1,

Juneau, Alaska. ,

Dear Sir:

We enclose herewith one copy of Annual Report for 1923 for the Northwestern Fisheries Company, for filing in your office, together with 10¢ in stamps to cover filing fee.

The original has been filed with the Secretary of the Territory.

In explanation of the fact that the Northwestern Fisheries Company has no property or liabilities, beg to advise that said Company is owned by the Booth Fisheries Company, Chicago, Illinois, and is not actively operating, but the organization of the corporation is maintained to preserve the name of the Company and its use in connection with the business of the Booth Fisheries Company.

Kindly acknowledge receipt, and oblige

Very truly yours,

P. H. McCUE,

Manager.

Enc.

Plffs. Exhibit No. 1. Received in Evidence Dec. 9, 1924, in Cause No. 1749 and 1778–B. John H. Dunn, Clerk. By ————, Deputy. [169]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 169 pages of typewritten matter, numbered from 1 to 169, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of attorney for defendant and plaintiff in error, on file herein and made a part hereof, in cause No. 1749–B and 1778–B, wherein the United States of America is plaintiff and defendant in error and Booth Fisheries Company, a corporation, is defendant and plaintiff in error, as the same appears of record and on file in my office.

I further certify that the said record is by virtue of a writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Seventy-three and 65/100 Dollars ($73.65), has been paid me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 18th day of February, 1925. ,

[Seal] JOHN H. DUNN,

Clerk.

————————,

Deputy. [170]

[Endorsed]: No. 4504. United States Circuit Court of Appeals for the Ninth Circuit. Booth Fisheries Company, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Division Number One.

Filed February 24, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Nos. 1749–B and 1778–B.

BOOTH FISHERIES COMPANY, a Corporation,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

STIPULATION AND ORDER OMITTING ORIGINAL EXHIBITS FROM PRINTED TRANSCRIPT OF RECORD.

It is hereby stipulated by and between the parties hereto that the Clerk of the Appellate Court need not print nor have reproduced the original exhibits, being Plaintiff's Exhibits Nos. 2 and 3, sent up with the record, but that such exhibits shall be used and considered by the Court upon the hearing the same as if printed.

This stipulation is made subject to the approval of the Court, and dated this 14th day of February, 1925.

H. L. FAULKNER,
Attorney for Plaintiff in Error.

A. G. SHOUP,
Attorney for Defendant in Error.

San Francisco, California, Feb. 25, 1925.
So ordered.

FRANK H. RUDKIN,
United States Circuit Judge.

Filed in the District Court, Territory of Alaska, First Division. Feb. 14, 1925. John H. Dunn, Clerk. By ————, Deputy.

[Endorsed]: No. 4504. United States Circuit Court of Appeals for the Ninth Circuit. Filed Feb. 25, 1925. F. D. Monckton, Clerk.

NO. 4504

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BOOTH FISHERIES COMPANY, a corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE, AT JUNEAU.

BRIEF FOR PLAINTIFF IN ERROR

H. L. FAULKNER,
Juneau, Alaska.
Attorney for Plaintiff in Error.

NO. 4504

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BOOTH FISHERIES COMPANY, a corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DIVISION NUMBER ONE, AT JUNEAU.

STATEMENT.

Defendant was informed against by the United States Attorney at Juneau, Alaska, by two informations filed in the District Court at Juneau for alleged violation of the Act of Congress, approved June 6, 1924, 43 Stat. L. page 464 locally known as the White Bill, which was an amendment to the Act of Congress of June 26, 1906. The first

information is No. 1749B and charges a violation of Section 4 of the White Act of June 6, 1924, alleging that defendant fished for salmon for commercial purposes by means of a fish trap within five hundred yards of the mouth of a small creek at or near Lucky Cove, Alaska, continuously from July 26th to August 20th, 1924. The second information is No. 1778B and charges the defendant with having unlawfully erected and maintained a floating fish trap within five hundred yards of the mouth of same stream on July 25th, 1924. There were two other counts in information No. 1778B but these were dismissed by the Court. For the purpose of the trial the two informations were consolidated.

The sections of the White Act approved June 6th, 1924, under which these prosecutions were brought read as follows:

> "Sec. 3. Section 3 of the Act of Congress entitled "An Act for the protection and regulation of the fisheries of Alaska," approved June 26, 1906, is amended to read as follows:
>
> 'Sec. 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream, or river into which salmon run, excepting the Karluk and Ugashik Rivers, with the purpose or result of capturing salmon or preventing or

> impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance.'

Sec. 4. Section 4 of said Act of Congress approved June 26, 1906 is amended to read as follows:

> 'Sec. 4. That it shall be unlawful to fish for, take or kill any salmon of any species or by any means except by hand rod, spear, or gaff in any of the creeks, streams or rivers of Alaska; or within five hundred yards of the mouth of any such creek, stream, or river over which the United States has jurisdiction, exception the Karluk and Ugashik Rivers: Provided, That nothing contained herein shall prevent the taking of fish for local food requirements or for use as dog feed."

The Defendant was convicted and sued out this Writ of Error to the District Court to review the judgment of that Court. The questions arising relate to the refusal of the Trial Court to give instructions requested by the Defendant to the effect

that the law required that the Secretary of Commerce should determine and mark the mouth of the stream in question; and that it was necessary to prove that the creek in question was a salmon stream between July 3rd and August 20th, 1924; and to the Court's instruction giving the definition of the mouth of a stream; and upon the necessity for the placing of markers in the mouths of salmon streams.

ASSIGNMENTS OF ERROR.

The record contains eight assignments of error, appearing on pages 171 to 175 thereof, and they are to the admission of certain testimony on the part of the Government, objected to by defendant, and the giving of said instructions by the Trial Court, excepted to by defendant and the refusal to give certain instructions requested by the defendant in writing, and the overruling defendant's motion for a new trial and to the rejection by the Court of certain evidence offered by the defendant. These assignments of error are as follows:

I.

"The District Court erred in overruling the objection of the defendant to the question propounded to the witness, Iver N. Stensland, by the United States Attorney, as follows:—

> "Now what was the effect of this trap being in this position with reference to salmon approaching the stream."

II.

The District Court erred in sustaining the objection to the question propounded by defendant's counsel to the witness, Iver Thue, as follows:—

> "Did you see at any of those times any seine fishermen fishing between the trap and the mouth of the creek."

III.

The District Court erred in giving Instruction No. VII. to the Jury, which reads as follows:

> "To this end, I charge you that the mouth of a stream emptying into tidewater, is the point or place where the waters of the stream meet tidewater at mean low tide. It is not where the waters of the stream meet tide water at high tide, but where the waters of the stream meet tidewater at mean—that is, the average—low tide."

IV.

The Court erred in giving Instruction No. XI. to the Jury, which is as follows:

> "A further question is whether there were any markers on that creek. I charge you that this is not material as to either of these informations. That clause in Section 3 reading, 'For the purposes of this section, the mouth of such creek, stream or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination.' is only for the purpose of fixing the mouth of the creek when and as determined by the Secretary of Commerce. The testimony herein shows that the

Secretary of Commerce has not fixed the mouth of the creek nor marked it, in which event it becomes a question of fact to as where the mouth of the creek is, to be determined by the jury in each particular case from the evidence and from the instructions given them by the court. If, however, the Secretary of Commerce should determine where the mouth of the creek is and should mark it, then the court would be bound by it; but, not having done so, the court is not bound by it."

V.

The District Court erred in giving Instruction No. XII. which reads as follows:

"Now, as to the question of notice to the defendant, that is not a material question in this case. Each offense in this case is what in law is called a malum prohibitum. The question of the good faith of the defendant does not arise in this case at all. The law provides that the defendant shall do certain things and the defendant is supposed to have notice of what the law provides. He is presumed to know the law, and where an act is prohibited which is not in itself immoral or wrong, it is termed a malum prohibitum and the defendant must do as the law required him to do, whether his intention was to violate the law or not."

VI.

The Court erred in refusing to give instruction No. II. requested by the defendant, which instruction reads as follows:

"You are instructed that Section 3 of the Act of Congress of June 6, 1924, under which

this prosecution is brought, provides as follows:

" 'Section 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream, or river into which salmon run, excepting the Karluk and Ugashik rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream or river shall be taken to be the point determined as such by the Secretary of Commerce and marked in accordance with this determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance.'

"You are instructed that in this case, unless it has been shown that the Secretary of Commerce, or some one under his direction, determined and marked the point designated as the mouth of the stream in question, you must find the defendant not guilty."

VII.

The Court erred in refusing to give to the jury Instruction No. III. requested by the defendant, which instruction reads as follows:

> "You are instructed that in order to find the defendant guilty, it is necesary for the government to prove that the stream in question was a stream or creek into which salmon ran prior to August 20, 1924; and if the government has not proved that salmon ran into this stream, or, in other words, that this was a creek into which salmon ran between the 3rd day of July and the 20th day of August, 1924, your verdict must be not guilty."

VIII.

The Court erred in overruling the defendant's motion for a new trial.

POINTS, ARUGMENT AND AUTHORITIES.

The assignments of error present to this Court for determination the following questions, namely:

First.

Was it error for the Trial Court to instruct the Jury as in instruction No. VII. which defined as a matter of law the mouth of a stream empyting into tidewater as set forth in assignment No. 3? (Tr. page 172).

Second.

Was it error for the Court to instruct the Jury as in instruction No. XI., in which the Court stated

that it was not material whether markers were placed on the Creek; and the mouth of the Creek determined and marked by the Secretary of Commerce? (Assignment No. 4 and 6, Tr. Page 172-3-4).

These two questions will be presented in the order hereinabove set forth.

I.

WAS IT ERROR FOR THE TRIAL COURT TO INSTRUCT THE JURY AS IN INSTUCTION NO. VII. WHICH DEFINED AS A MATTER OF LAW THE MOUTH OF A STREAM EMPTYING INTO TIDEWATER?

The Act of June 6, 1924, known as the White Act, under which this prosecution is brought is entitled "An act for the protection of the fisheries of Alaska and for other purposes"; and sections 3 and 4 of this act of June 6, 1924, are simply amendments of Sections 3 and 4 of the Act of June 26, 1906. The evidence shows that the defendant maintained a floating fish trap at a certain point in Lucky Cove for at least eight years. The two informations together, which were consolidated at the trial, charged first that the company violated Section 4 of the White Act by fishing for salmon within five hundred yards of the mouth of the creek; and, secondly, that it maintained a fish trap within five hundred yards of the mouth of the same creek. The fishing alleged to have been done

in information No. 1749B was done by means of the same trap mentioned in information 1778B and alleged to have been maintained within five hundred yards of the mouth of the creek. The same acts which are relied upon to support allegations in one information are also relied upon to support the allegations in the other. In other words, it is contended that the same act constitutes two crimes.

It is our contention that Section 3 of the White Act was intended to apply to *fish traps* and that Section 4 was intended to apply to *other means of fishing* within the prohibited distance from the mouth of a creek, stream or river. In this case the evidence shows that the company was fishing by means of a floating fish trap at Lucky Cove, and by no other means.

The Court instructed the Jury that "the mouth of a stream emptying into tidewater is the point or place where the water of the stream meets tidewater at mean low tide." In determining whether this instruction was proper a comparison of Section 3 of the law of June 26, 1906 with Section 3 of the law of June 6, 1924 will be instructive. Section 3 of the old law of June 26, 1906 reads as follows:

> "That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel or other fixed or stationary obstruction except for the purposes of fish culture, in any

> of the waters of Alaska, at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any red salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed."

Section 3 of the White Act of June 6, 1924 is simply an amendment of the above quoted section of the old act, and reads as follows:

> "That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream, or river into which salmon run, excepting the Karluk and Ugashik Rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purpose of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any

> of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing applance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance."

It will be observed that under the old law no attempt was made to define the mouth of a creek, stream or river, and it is a mixed question of law and of fact. There are many rivers, creeks and streams flowing into the tidewaters of the Coast of Alaska, from a river of the size of the Yukon down to the unnamed creek at Lucky Cove, and no broad definition could be given which would define the mouths of all streams and rivers and be applicable alike to small creeks and rivulets and to large rivers. It seems that this is apparent from the fact that Congress in amending the old law of 1906 saw fit to insert in the new law the provision which defines the mouth of a creek, stream or river as the "point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination." If the Court's instructions were correct there would be no occasion for this provision in the White Act for if the mouth of a stream could be determined as a matter of law why then should the Secretary be authorized to determine the mouth and to mark it in accordance with his determination?

As a matter of fact much difficulty has been heretofore experienced in determining just what constitutes the mouth of a stream and this provision

was inserted in the Act of June 6, 1924 in order to settle the matter and in order to fix as a matter of law the point which constituted the mouth of a stream. This is borne out by the testimony of Mr. Ball, the Assistant Fish Commissioner and the chief prosecuting witness, in answer to questions as follows:

> Q: "Now Mr. Ball you had some— * * * and there has been some little difficulty about determining the mouth of a stream, hasn't there?"
>
> A: "In some places it has been very hard to determine."
>
> Q: "Now was the mouth of this stream marked at any time?"
>
> A: "Not that I know of." (Tr. p. 37).

It is a fact that there are many streams which empty into the tide waters where a trap could be constructed which would be fifteen hundred feet from the mouth of the stream at mean low tide as defined by the Court here, but which would be perhaps less than twelve hundred feet from the actual mouth of the stream at half tide, and I do not think it could be for one moment contended that in such a situation the Bureau of Fisheries would permit a trap to be maintained in the face of the provisions of Section 3 of the White Act. For instance, if a stream flowed out to the beach in a straight line in the direction of a fish trap and came down several hundred feet on the beach

and to a point within a few hundred feet of the trap and then suddenly turned sharply at an angle, flowing away from the trap so that the point at which the waters of the stream emptied into the tide waters at mean low tide would be more than fifteen hundred feet distant from the trap, it could hardly be conceived that the Secretary of Commerce could not and would under Section 3 of the White Act, determine the mouth of the stream to be at that point where the stream came nearest to the trap on the beach; and indeed it would be defeating the purpose of the law to construe it otherwise; for the act is for the protection and regulation of fisheries, and it is a well known fact that most fish which enter salmon streams and particularly small streams, enter at high tide and not at low tide. However, if the Court's definition of the mouth of a stream is correct, under such a situation as we have described, the fish would be protected from the trap at low water when the protection was not required and they would be getting the least protection at half tide or high tide when the protection was needed. That it must have been with these considerations in view and knowing that as a matter of fact it was very hard to determine the mouth of some streams that Congress enacted the provision in Section 3 of the White Act defining the mouth of a stream to be the point determined and marked by the Secretary of Commerce, is apparent.

It seems to me that we cannot reconcile the instruction of the Court, defining the mouth of the stream as a matter of law with the law itself, which leaves that definition to the Secretary of Commerce.

As stated before the White Act of June 6, 1924 is not an entirely new law but only an amendment to the existing law; and in interpreting its provisions the old law and the amendment should be considered together.

> "In the construction of amendments to statutes, the body enacting the amendment will be presumed to have had in mind existing statutory provision and the judicial construction touching the subject dealt with. The amendment and the original statute are to be read together in seeking to discover the legislative will and purpose and if they are fairly susceptible of two constructions, one of which gives effect to the amendatory act, while the other will defeat it, the former construction should be adopted." (25 R. C. L. page 1067, Section 291).

In this case if the trial court's definition of the mouth of a stream is correct, the provision in Section 3 of the White Act, that the mouth shall be taken to be the point determined and marked by the Secretary, is of no force nor effect; and the Court instead of giving effect to the amendatory act will be disregarding the amendment. It is elementary that in the construction or interpretation of a statute the first consideration is to determine the

intent of the legislature. In this case, it was clearly not the intent of the legislaure to fix the mouth of a stream in all cases as the point where the waters of the stream meet the tidewaters at mean low tide.

> "It is well settled that in construing any statute all the language shall be considered and such interpretation placed upon any word or phrase appearing therein as was within the manifest intent of the body which enacted the law." (25 R. C. L. p. 988 Sec. 234.)

> "It is a familiar rule in the construction of terms to apply to them the meaning naturally attached to them from their context. Noscitur a Sociis is a rule of construction applicable to all written instruments and statutes. Where any particular word is obscure or of doubtful meaning taken by itself, its obscurity or doubt may be removed by reference to associated words." (25 R. C. L. p. 995, Section 239).

It is safe to assume that Congress placed the provision for marking the mouths of streams in the White Act for the very reason given by Mr. Ball when he stated, as hereinabove quoted "*it was very hard to determine the mouth of a stream in some places,*" and it is only common sense to assume that this question had resulted in considerable confusion and uncertainly under the law before it was amended.

Testimony of E. M. Ball, (Tr. pp. 37-38) shows that the Bureau officials had measured the distance

from this trap in question to what was considered the mouth of the steam in 1923 and found it to be 1590 feet. The following questions were asked Mr. Ball:

> Q: "Well, you know whether your Bureau officials had inspected the trap."
>
> A: "Yes, the trap was examined several times in 1923."
>
> Q: "Now was the distance measured before by the Bureau?"
>
> A: "I think Mr. Stensland made one measurement in 1923."
>
> Q: "Do you know the result?"
>
> A: "At high water."
>
> Q: "Do you know the result of that?"
>
> A: "1506 feet I think het old me."
>
> Q: "1506 feet?"
>
> A: "Yes."
>
> (Tr. pp. 37-38).

The answer 1506 feet was apparently an inadvertence; for the sketch introduced in evidence by the prosecution, as plaintiff's exhibit No. 3, shows this distance to be 1590 feet and Mr. Ball's answer to a question by Mr. Shoup, using the exhibit No. 3 for illustration was "along this direction to the same point was 1590 feet." (Tr. p. 30). In this testimony it is true that Mr. Ball uses the word high water mark; and this may have referred to periods of freshets in the creek although the wit-

ness did not state what he meant by high water mark, nor did he state whether the distance would have been less than 1590 feet at this point at low water mark on the creek.

In answer to a question by the District Attorney the witness, Stensland, a fish warden testified as follows:

> Q: "Did you make any other measurements?"
>
> A: "I made measurements there last year the first time I was in there."
>
> (Tr. p. 68).

Mr. Stensland did not say what those measurements were but it is safe to assume it must have shown the distance to be more than fifteen hundred feet or the trap would not have been permitted to continue fishing; and if it were less than 1500 feet he would have so testified.

It is therefore plain that the Bureau officials acting under the Secretary of Commerce had measured the distance from the trap to what they considered and established the mouth of the stream in 1923 and found the distance to be 1590 feet. The testimony shows the trap to have been in exactly the same place each year (Testimony of Iver Thue, Tr. p. 105; testimony of A. A. McCue, Tr. p. 107). In fact, the Bureau officials conceded that the trap was in the same spot each year.

The Secretary of Commerce, therefore, and those acting under him, placed a certain construc-

tion upon the statute and determined what they considered the mouth of the stream in 1923, and they found the trap to be more than five hundred yards from the mouth of the stream.

> "The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officer in the executive department of the Government or has been observed and acted upon for many years and such construction should not be disregarded or overturned unless it is clearly erroneous." (*U. S. vs. Finnell*, 185 U. S. p. 236; *U. S. vs. Johnstone*, 124 U. S. p. 236).

This rule is particularly applicable to this case for the old law of 1906 prohibited fish traps within five hundred yards of the mouth of a stream in almost the identical language of the amended White law of 1924 and the Bureau had evidently determined the mouth of the stream in question to be at the point where Mr. Ball said it measured 1590 feet; and as shown on the exhibit.

It is quite apparent that the officials of the Bureau considered the mouth of the stream to be at the point where the distance is shown to be 1590 feet, for Mr. Ball stated that after his measurements were made in 1924 he had talked to the General Manager of the company the night they made the new measurements and did not at any time notify him to remove the trap. (Tr. p. 36). It is therefore safe to assume that they decided to

change the point which they had considered the mouth of the stream afterward, and they made this decision without any notice to the defendant. Ordinarily no notice would be required but under the wording of this statute, which provides that for the purpose of Section 3 the mouth of the creek shall be taken to be the point determined to be such mouth by the Secretary of Commerce and marked, etc., we contend that the Bureau officials should have placed a marker at the new point determined by them to be the mouth of the stream in 1924. They had already established the point in 1923 and having changed it in 1924 after the White Law was enacted and in effect it was their duty to place a marker at the new point determined by them in 1924.

As further proof that the Bureau officials considered the point marked upon Exhibit 3 as being 1590 feet from the trap, as the mouth of the stream, we have the testimony of Mr. Stensland, in which he states he found fish in the stream in September 1923; and if this is true, he knew it was a fish stream at that time and yet he was at the trap five times during the fishing season of 1924 and at all of these times the trap was fishing and he did not order the trap closed nor complain about it nor interfere with it. This clearly indicates that the Bureau had established the mouth of the stream in 1923 at the point mentioned, which was 1590 feet from the trap. Mr. Stensland further

testified in answer to a question by the District Attorney, as follows:

> Q. "Now point out on that map the meander line of low tide; that is, mean low tide."
>
> A. "The meander line of mean low tide is this shaded line—this line outside of the shaded area. *There is a gravel bar there and it goes dry right at the mouth of the stream at mean low tide.* * * * " (Tr. p. 66).

The purpose of the law under which this prosecution was brought; and the purpose of both acts herein mentioned was to protect and regulate the fisheries of Alaska and if Mr. Stensland knew in 1923 that the stream in question was a salmon stream and that the trap was within the prohibited distance, and if Mr. Ball knew on July 26, 1924 that the trap was within the prohibited distance of the stream, it would have been their duty to have seized the trap and to have prosecuted the owner. They did not do this, however, for the reasons herein stated that the trap was not within five hundred yards of what had been then established as the mouth of the stream. It is plain from the evidence that the officials of the Bureau *suddenly decided to change the point which they considered the mouth of the stream* and they did this without marking the point or without notifying the defendant of their decision; and permitted the defendant to continue to fish until August 19, 1924 in reliance upon the fact that the mouth of the

stream was at the point which Mr. Stensland had measured in 1923 and which was 1590 feet distant from the trap.

Instructions Nos. VII. and XI. are inconsistent for in instruction No. VII. the Court defined the mouth of a tsream as *a matter of law.* In instruction XI. the Court instructed in effect that where the Secretary of Commerce had not fixed the mouth of a creek nor marked it, it became a *question of fact* as to where the mouth was. (Tr. pp. 140-143).

It seems very clear that Congress did not intend that the point which should be marked by the Secretary of Commerce and which should be considered the mouth of a stream in all cases should be the point where the waters of the stream meet the tidewaters at mean low tide. There are many places in Alaska, as elsewhere, where streams come down to the tidewaters and spread out on the beach into several channels. Part of the waters of the stream meet tidewaetr at one point and part at another point; and some of the channels of the stream might be sufficient for fish to enter the stream at the mouth at mean low tide and some of them may be insufficient. This is often the case, and the plain intent of Congress seems to have been to leave the whole matter to the discretion of the Secretary of Commerce, acting of course, through the Bureau of Fisheries, to mark what-

ever point or points he considered would best protect the fish.

It would be absurd to assume that in the illustration we have given where a portion of a creek flowing over the tide flats would be much nearer to a fish trap than fifteen hundred feet, but where nevertheless the creek would take a turn before actually entering the tidewater at mean low tide, so that its actual mouth at mean low tide would be more than fifteen hundred feet distant from the trap, that the Secretary of Commerce, under this law, would not have the power to determine and fix the mouth of the stream at the point nearest the fish trap, although it might be several hundred feet from the actual point where the waters of the stream meet the tidewaters at mean low tide. In fact, it would be the Secretary's duty to mark the mouth as the point nearest the trap, for by so doing he would be protecting the fish, and in marking it at the actual point where the creek waters meet the tidewaters, he would be affording the fish no protecion, and would be defeating the purpose of the law.

II.

WAS IT ERROR FOR THE COURT TO INSTRCT THE JURY, AS IN INSTRUCTION XI., IN WHICH THE COURT STATED THAT IT WAS NOT MATERIAL WHETHER MARKERS WERE PLACED ON THE CREEK AND THE

MOUTH DETERMINED AND MARKED BY THE SECRETARY OF COMMERCE?

The facts to be determined in considering this question are necessarily interwoven with the facts upon which depended the consideration of the first question.

The Court instructed the Jury, in Instruction No. XI., that it was not material whether there were any markers placed in the mouth of the creek; and that it became a question of fact as to where the mouth of the creek was, etc. The Court stated,

> "If, however, the Secretary of Commerce should determine where the mouth of the creek is and should mark it, then the Court would be bound by it; but not having done so, the Court is not bound by it." (Instruction No. XI. Tr. p. 143).

As stated, in considering the first question, the testimony shows that the Bureau officials, acting under the Secretary of Commerce, had determined the mouth of the stream in 1923 and had found the distance from the trap to be 1590 feet. *They then changed the point* to which they measured from the trap, on July 26, 1924, and found the distance to be less than fifteen hundred feet, *but they did not mark the new point* designated by them in 1924, nor did they notify the defendant, who for many years had maintained the trap at the same point, and who was permitted to

continue to maintain the trap until the close of the fishing season of 1924. The record shows that this information was not filed until October 16, 1924, which was almost two months after the close of fishing at Lucky Cove.

If the Bureau officials had never measured the distance from the trap to the stream; had never established any measurements, nor any point as being the mouth of the stream in 1923; or if they had measured the distance to the new point in 1924 and the defendant had afterward installed the fish trap, there might be some merit in the contention that since the Secretary had not determined the mouth of the stream, the defendant erected and installed the fish trap at its peril and was not warranted in expecting to find any marker at the mouth of the stream; but the testimony shows that the mouth of the stream had been established in 1923; and that the Secretary in 1924 determined upon a new point and did not either mark the new point, nor notify the defendant of its location. The law does not give the Secretary the power nor authority nor does it direct him to determine the mouth of a stream and keep it secret, but the law directs the Secretary to "*determine and mark*" the mouth of the stream, and where he has once determined it, he is bound to mark it in accordance with his determination.

The Court instructed the Jury in Instruction XI. that if the Secretary had not determined nor

marked the mouth of the creek the Court would not be bound by it; and the Court said that "the testimony herein shows that the Secretary of Commerce had not fixed the mouth of the creek nor marked it, Etc." This statement is not in accordance with the evidence, for the testimony shows that the Secretary had determined and fixed the mouth of the creek but had not marked it. (Testimony of Ball, Tr. p. 37).

As stated before, the reason for the provision in the act of June 6, 1924 authorizing and directing the Secretary to determine and mark the mouths of streams was because there had been great difficulty experienced under the law in determining the point which should be considered the mouth of a stream. The reason for inserting this provision in the law, as amended, was to do away with the confusion and uncertainty which had heretofore existed, and to make it the duty of the Secretary to definitely determine the mouth of each salmon stream in the vicinity of which fishing was carried on. The law is an act for the protection of the fisheries of Alaska and its purpose was to protect and perpetuate the fishing industry and to definitely settle, as far as possible, all fishing rights.

This provision in the act of June 6, 1924 for the determination and marking of the mouths of streams is mandatory; and the mouth of the stream should have been both determined and marked by

the Secretary after the measurements were taken in 1924; for the Act made it the duty of the Secretary to both determine and mark the mouth of the stream and surely it was his duty to mark it after he had determined it. The law reads: "For the purpose of this secetion, etc." Now the purpose of the section was to determine the mouth of the stream and to prevent fishing within the prohibited area and to warn and inform all trap owners and fishermen to keep their traps and gear outside the prohibited area.

> "Whether a particular statute is mandatory or directory does not depend upon its form but upon the intention of the legislature, to be ascertained from a consideration of the entire act, its nature, its object and the consequences that would result from construing it one way or the other." (36 Cyc. p. 1157).

> "Such expressions as 'authorized and empowered' and 'shall have power' are to be construed as mandatory or permissive, in accordance with the legislative intent manifest in the particular act." (36 Cyc. p. 1161).

In this case it can hardly be contended that the language of the statute, defining the mouth of the stream to be the point determined and marked by the Secretary of Commerce, was mere idle words, or left the matter to the discretion of the Secretary. It is an express direction and command to the Secretary to determine and mark the actual mouth of each salmon stream, or the point considered to be the mouth for the purpose of Sec-

tion 3 of the act; that is the point where the fish will be best protected by keeping all fishing and fishing appliances fifteen hundred feet distant. This provision was surely inserted in the act for the protection of the fisheries and for a definite purpose; and even if it could for a moment be contended that it is merely directory and to be exercised by the Secretary and the Bureau officials only where they see fit, it cannot be contended that if they exercise the discretion given them to *determine* the mouth of a stream, they can at the same time refuse or fail to *mark the point* so determined, or even to notify those who have, in good faith, been fishing within fifteen hundred feet of the point so determined, with the full sanction of the Secretary.

This is a penal statute and Section 6 provides that any person or corporation violating any of the provisions of Section 3, shall be punished by a very heavy fine and the forfeiture of all fishing appliances, gear and fish taken in violation of the law. It has long been the well settled rule that penal statutes are subject to the rule of strict construction. Examination of the record in this case will show that the defendant was acting in the utmost good faith; that it had maintained its trap at the point where it was in 1924 for eight years, with the sanction of the officials of the Department of Commerce, who had previously examined

the trap and measured the distance to the stream; and one of whom, if his testimony is true, knew in 1923 that there were some fish in the stream, but who nevertheless saw the trap in full operation five times at least during the fishing season of 1924, but who nevertheless gave the company no warning, placed no markers at any point on the stream and did not notify them as to what was considered the actual distance from the trap to the mouth of the stream in 1924; nor did he seize the trap nor complain against the company. Notwithstanding this, two months after the trap ceased fishing and had been removed, complaints were filed against the defendant in the District Court at Juneau, several hundred miles from the scene and at a time when defendant's main witnesses had left the country and could not be found. Testimony A. A. McCue, Tr. p. 108).

The law is designed to protect fish and to regulate the great fishing industry of the Territory of Alaska and it is not designed to entrap those engaged in the fishing industry, like the laws of Caligula, which were written in small characters and placed upon high poles so that they could not be read, in order that the people might be ensnared. The law was not enacted to protect the lives of all fish and to preserve them alive in the water at all times, but it was enacted to insure the supply of fish for food and to perpetuate the industry of

catching and canning fish for food; and to protect the fish supply for this purpose. It was not the purpose of Congress to protect and preserve the lives of the fish so that they might continue to swim in the streams and the sea, but to protect the industry of getting fishing as a source of food supply and to preserve the fish only for the purpose of obtaining them as food. The law should be interpreted in this light and not in a manner which would permit the Bureau officials to encourage a person or corporation to continue a violation of the law, in order that the Bureau might secure a conviction and subject the violator to a fine. By marking the mouth of the stream and notifying the defendant on July 26, 1924 that its trap was within the prohibited distance, as then determined by the Secretary of Commerce, the result would have been to protect the fish and carry out the manifest intent of the statute. By failing to place the marker at the determined point and by failing to notify the defendant of the Secretary's determination, the result has been a large fine imposed upon the defendant, but the intended purpose of the law has not been carried out nor have its mandates been obeyed by the enforcing officers.

We believed that the decision of the lower Court is wrong and that under the instructions, the Jury was left no discretion to determine the questions of fact involved in the case; and that the

Court placed the wrong interpretation upon Sections 3 and 4 of the White Act.

Dated at Juneau, Alaska, April 9th, 1925.

Respectfully submitted,
H. L. FAULKNER,
Attorney for Plaintiff in Error.

APPENDIX

AN ACT FOR THE PROTECTION OF THE FISHERIES OF ALASKA, AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed season during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during

the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed season may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress.

It shall be unlawful to import or bring into the Territory of Alaska, for purposes other than

personal use and not for sale or barter, salmon from waters outside the jurisdiction of the United States taken during any closed period provided for by this Act or regulations made thereunder.

Sec. 2. In all creeks, streams, or rivers, or in any other bodies of water in Alaska, over which the United States has jurisdiction, in which salmon run, and in which now or hereafter there exist racks, gateways, or other means by which the number in a run may be counted or estimated with substantial accuracy, there shall be allowed an escapement of not less than 50 per centum of the total number thereof. In such waters the taking of more than 50 per centum of the run of such fish is hereby prohibited. It is hereby declared to be the intent and policy of Congress that in all waters of Alaska in which salmon run there shall be an escapement of not less than 50 per centum thereof, and if in any year it shall appear to the Secretary of Commerce that the run of fish in any waters has diminished, or is diminishing, there shall be required a corresponingly increased escapement of fish therefrom.

Section 3. Section 3 of the Act of Congress entitled "An Act for the protection and regulation of the fisheriesof Alaska," approved June 26, 1906, is amended to read as follows:

"Sec. 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish

wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream, or river into which salmon run, excepting the Karluk and Ugashik Rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance."

Sec. 4. Section 4 of said Act of Congress approved June 26, 1906 is amended to read as follows:

"Sec. 4. That it shall be unlawful to fish for, take, or kill any salmon of any species or by any

means except by hand rod, spear, or gaff in any of the creeks, streams, or rivers of Alaska; or within five hundred yards of the mouth of any such creek, stream or river over which the United States has jurisdiction, excepting the Karluk and Ugashik Rivers; Provided, That nothing contained herein shall prevent the taking of fish for local food requirements or for use as dog feed."

Sec. 5. Section 5 of said Act of Congress approved June 26, 1906 is amended to read as follows:

"Sec. 5. That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by hand rod, spear, or gaff for personal use and not for sale or barter in any of the waters of Alaska over which the United States has jurisdiction from six o'clock postmeridian of Saturday of each week until six o'clock antemeridian of the Monday following, or during such further closed time as may be declared by authority now or hereafter conferred, but such authority shall not be exercised to prohibit the taking of fish for local food requirements or for use as dog feed. Whenever the Secretary of Commerce shall find that conditions in any fishing area make such action advisable, he may advance twelve hours both the opening and ending time of the minimum thirty-six-hour closed period herein stipulated. Throughout the weekly closed season herein prescribed the gate, mouth,

or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the 'heart' of such traps on each side next to the 'pot' shall be lifted or lowered in such manner as to permit the free pasage of salmon and other fishes."

Sec. 6. Any person, company, corporation, or association violating any provisions of this Act or of said Act of Congress approved June 26, 1906, or of any regulation made under the authority of either, shall, upon conviction thereof, be punished by a fine not exceeding $5,000 or imprisonment for a term of not more than ninety days in the county jail, or by both such fine and imprisonment; and in case of the violation of Section 3 of said Act approved June 26, 1906, as amended, there may be imposed a further fine not exceeding $250. for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act, approved June 26, 1906, and all fish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the Court in which the forfeiture is declared, at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such

forfeiture shall be in rem under the rules of admiralty.

That for the purposes of this Act all employees of the Bureau of Fisheries, designated by the Commissioner of Fisheries, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of this Act as have United States marshals or their deputies.

Sec. 7. Sections 6 and 13 of said Act of Congress approved June 26, 1906, are hereby repealed. Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal, but all liabilities under such laws shall continue and may be enforced in the same manner as if committed, and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this Act, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

Sec. 8. Nothing in this Act contained, nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail the powers granted the Territorial Legislature of Alaska by the Act of Congress approved August

24, 1912, "To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes."

Approved, June 6, 1924.

NO. 4504.

In The

United States Circuit Court of Appeals

For the Ninth Circuit

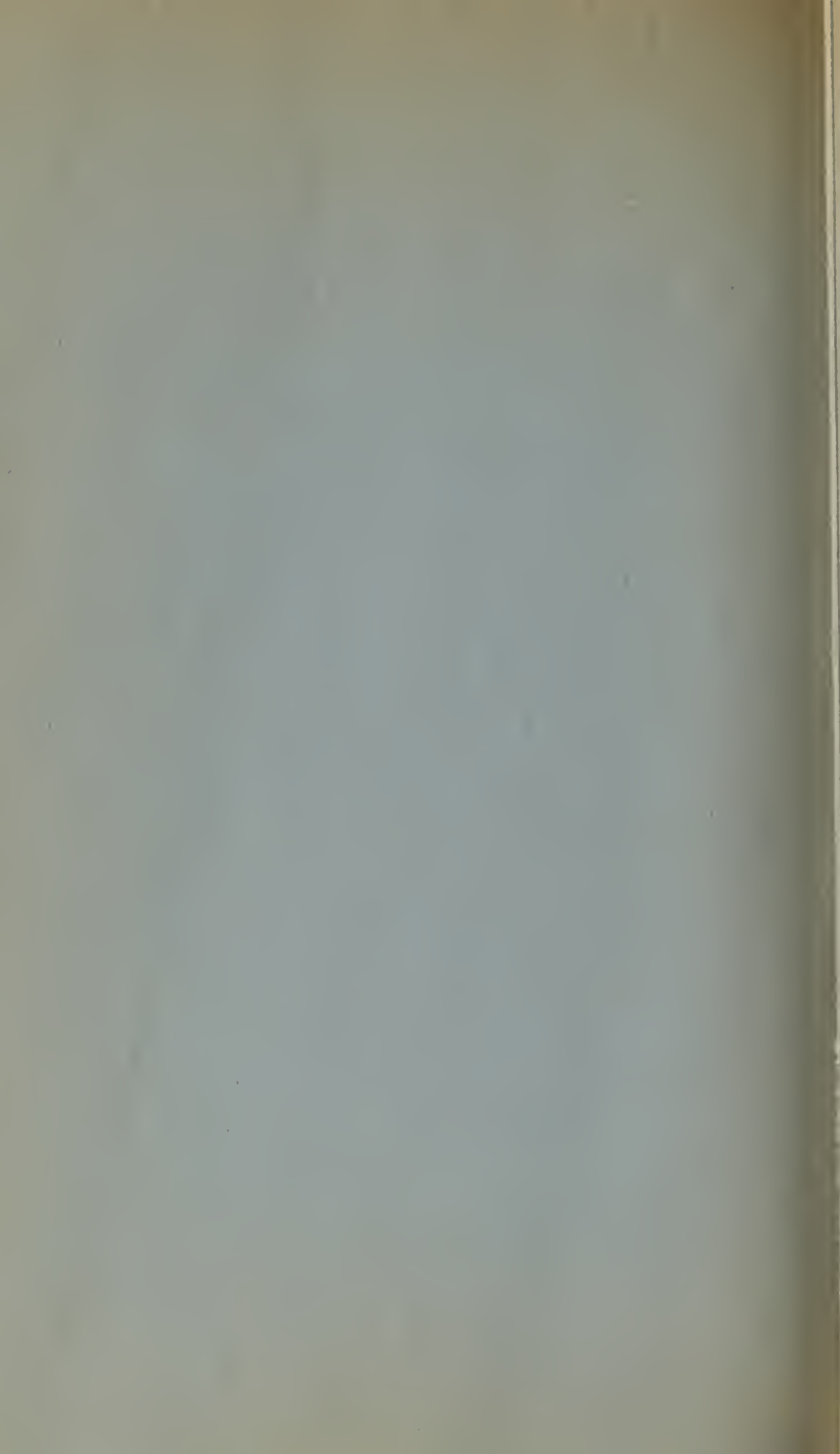
BOOTH FISHERIES COMPANY,
a corporation,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Division Number One.

Brief for Defendant in Error

ARTHUR G. SHOUP,
United States Attorney
HOWARD D. STABLER,
Asst. U. S. Attorney
For Defendant in Error.

FILED
JUN 12 192
F. D. MONCK



NO. 4504.

In The

United States Circuit Court of Appeals

For the Ninth Circuit

BOOTH FISHERIES COMPANY,
a corporation,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Division Number One.

Brief for Defendant in Error

ARTHUR G. SHOUP,
United States Attorney
HOWARD D. STABLER,
Asst. U. S. Attorney
For Defendant in Error.

In The

United States Circuit Court of Appeals

For the Ninth Circuit

BOOTH FISHERIES COMPANY,
a corporation,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Division Number One.

Brief for Defendant in Error

STATEMENT.

On December 10, 1924, Booth Fisheries Company was found guilty by a jury of two separate violations of the fisheries laws. Conviction in Case No. 1749-B was for illegally fishing for and taking salmon for commercial purposes from July 26, 1924, until August 20, 1924, by means of a fish trap, within 500 yards of the mouth of Lucky Cove Creek, in violation of section 4 of the Act of Congress approved June 26, 1906, as amended by the Act of June 6, 1924, commonly known as the White Bill, being an Act of Congress for the protection and conservation

of the fisheries of Alaska. Conviction in case No. 1778-B was for illegally erecting and maintaining a fish trap, on July 25, 1924, within 500 yards of the mouth of Lucky Cove Creek, with the purpose and result of capturing salmon and preventing and impeding their ascent to the spawning grounds in said Creek, in violation of section 3 of the same Act of Congress. The two cases were consolidated and tried together.

Plaintiff in error sets up eight assignments of error. Assignments 3 and 4 are argued in the brief. The remaining six assignments are set up in the brief, but they are not argued.

The plan of this brief is to meet, first, assignments 3 and 4, and thereafter the six unargued assignments.

ARGUMENT.

ASSIGNMENTS 3 AND 4.

The principal objections urged, and the only points argued, are in Assignments 3 and 4.

Assignment 3 is as follows (p. 5 Brief; p. 172 Trans.):

> "The District Court erred in giving Instruction No. VII to the jury, which reads as follows:
>
> 'To this end, I charge you that the mouth of a stream emptying into tidewater, is the point or place where the waters of the stream meet tidewater at mean low tide. It is not where the waters of the stream meet tide water at high tide, but where the waters of the stream

> meet tidewater at mean—that is, the average—low tide.' "

The point urged by plaintiff in error is (p. 8 Brief): "Was it error for the trial court to instruct the jury as in Instruction No. 7 which defined as a matter of law the mouth of a stream emptying into tidewater?"

In each of the actions it was necessary to fix the mouth of Lucky Cove Creek in order to determine whether the defendant had engaged in illegal fishing operations, or had maintained an unlawful obstruction, within 500 yards of the mouth of such creek.

There was considerable evidence to show, and there was a map (now on file here) offered in evidence to illustrate, the point or place where the fresh waters of Lucky Cove Creek met the salt waters of Lucky Cove. (Trans. pp. 32-67.) The determination of the point or place where the fresh waters of Lucky Cove Creek united with the salt waters of Lucky Cove at mean low tide, as a fact, was left to the jury by the court under the following instruction:

> " . . . The testimony herein shows that the Secretary of Commerce had not fixed the mouth of the creek nor marked it, in which event it becomes a question of fact as to where the mouth of the creek is, to be determined by the jury in each particular case from the evidence and from the instructions given them by the court. . ." Instruction 11 (p. 143 Trans.)

Did the court correctly define to the jury the point or place they were to locate and determine as a fact? In other words: Did the court correctly state the law in the instruction that the mouth of a stream emptying into salt water is the point or place where the waters of the stream meet tide waters at mean low tide?

We assert now that the instruction was a correct statement of the law. We are confronted with the fact that the phrase "mouth of a stream" has never been judicially construed by this court, as far as we have been able to determine. Indeed, in very few instances has the phrase ever been judicially defined. We have patiently and exhaustively searched through the reports and decisions in an effort to assist this court in arriving at a correct construction and interpretation of the words "mouth of a stream" as used in sections 3 and 4 of the White Bill. We hope the following will convince the court, as we are convinced, that the instruction correctly stated the law of the case.

At first glance, the mouth of a stream might be at any one of four places: (1) at low tide; (2) at high tide line on the sea beach; (3) at any point between low and high tide, the mouth shifting on the beach with the tide; and (4) above high tide line, the mouth shifting with the rise and fall of the tidal waters.

It is apparent that some definite fixed point or

place must be determined as the mouth of such a stream as is referred to in sections 3 and 4 of the White Bill.

Many salmon streams in Alaska are similar to Lucky Cove Creek, that is, many of such streams at low tide flow over flats below high tide line of the sea shore, through well defined channels, confined by banks on each side, for a considerable distance before the fresh waters of the stream unite with the salt waters of the sea.

Now, if we should assume that the mouth of a stream is at high tide line, or above high tide line, on the sea shore, we would be confronted with this incongruity: In any salmon stream flowing over tide flats for a distance greater than 500 yards from high tide line on the sea shore, such stream would be absolutely unprotected between high and low tide lines, excepting for 500 yards below high tide line.

This situation could not arise if the mouth of a stream is at the lowest point on a stream, that is, where the waters of the stream unite with salt waters at low tide, because it is unlawful to fish for, take, or kill salmon **in a stream**; or to fish for, take, or kill, or obstruct salmon within 500 yards of the mouth of a stream. (Sections 3 and 4 ante.)

Again, if the mouth of a stream fluctuates with the tide according to our illustration (3), and moves up and down the beach with the tide as fresh waters unite with salt waters, then a fixed fishing appli-

ance might be in the incongruous position of fishing for, taking or obstructing salmon lawfully at one stage of the tide, and unlawfully at another stage of the tide.

We submit that it was not the intention of Congress to leave any portion of a stream, or within 500 yards of its mouth, unprotected at any stage of the tide. Sections 3 and 4 of the White Bill fully protect any and all salmon streams in Alaska at all stages of the tide, if the mouth of a stream is where fresh water meets or unites with salt water at mean low tide.

Therefore, we submit that Congress intended the words "mouth of a creek, stream, or river" to mean that point in a creek, stream, or river where fresh waters meet or unite with salt waters at mean low tide. We further submit that in so defining the mouth of a creek, stream, or river the court correctly stated the law of the case.

In our extensive examination of reports and authorities in an effort to assist this court in arriving at a correct interpretation of the phrase "mouth of a stream," we have not discovered a single case which even intimates that the mouth of a stream, for such purposes as are expressed in sections 3 and 4, is at any other point or place than as defined by Instruction seven in these cases. On the contrary, all of the cases and authorities we have been able to find clearly show that a point at low water is intended.

Section 5187 Rem. & Ball. Ann. Codes and Statutes of Washington provides:

> " . . . It shall be unlawful at any time to take fish * * in Chambers Creek in the County of Pierce, or within two hundred and fifty yards of the mouth of said Creek, and the mouth of said creek shall be construed to mean the junction were the fresh and salt waters meet at low tide. . . ."

It is apparent that the Legislature of Washington intended to fully protect the fish in Chambers Creek to the lowest possible point on the creek, and at all stages of the tide.

Rev. Stat. Ariz. 1901, Par. 931, provides:

> "The mouth of a creek or river, or the junction of a creek or river with a river, is the point where the middle of the channel of each intersects the other."

It is apparent that the statute defines the mouth as the lowest point on the stream.

Vol. 5, Words and Phrases Judicially Defined, page 4614, says:

> "The mouth of a creek, river or slough which empties into another creek, river or slough is the point where the middle of the channels intersect. Pol. Code Cal. 1903, Section 3908."

Again it is apparent that the mouth of a stream is the farthest point down the stream from the source.

Farnham on Waters and Water Rights, Vol. 2, page 1643:

> "The mouth of a stream emptying into a tidal river is where it flows into it when the tide

> permits it to flow and is the same at high water as at low water."

It is clear that a point at low tide is intended as the mouth of a stream.

In the case of Minnesota v. Wisconsin, 252 U. S. 273, 40 Sup. Ct. 313, a boundary dispute arose between the two states and it became necessary to interpret the meaning of the words "to the mouth of the St. Louis River." The court says:

> "The complainant maintains that within the true intendment of the statute the 'mouth of the St. Louis River' is southeast of Big Island, where end the banks, channel and current characteristic of a river, and lake features begin. On the other hand the defendant insists, and we think correctly, that such mouth is at the junction of Lake Superior and the deep channel between Minnesota and Wisconsin points—'The Entry'."

Again, the very furthermost point downward in the river is the mouth.

In an early Pennsylvania case, Ball v. Slack, 30 Am. Dec. 278, the Supreme Court of Pennsylvania decided as a matter of law what was the mouth of Gunner's Creek, a small stream emptying into the Delaware River at a point where the river was affected by tide waters. The tide went up Gunner's Creek a mile or more. The court said:

> "The mouth of Gunner's Creek must mean the place where it discharges its water into the Delaware; if it meant the point beyond which the tide did not stop its current, or swell beyond its banks, then the mouth was a mile from the spot

> in dispute; which is not pretended. * * * Gunner's Creek is where the water of that creek flows, when the tide permits it to flow; and the mouth of Gunner's Creek is where it flows into the Delaware, when the tide permits it to flow; and is the same at high water as at low water."

It is very evident the court meant that the mouth of Gunner's Creek was the lowest point on the creek where it flowed into the Delaware River when there was no tide in either the creek or the river, that is, at low tide.

Judge Jennings of the District Court for the First Division, District of Alaska, in 1914, in U. S. vs. Pure Food Fish Co. et. al., No. 1023-B, instructed the jury as to the mouth of a stream under these sections in the following language:

> "Now, as a matter of law, gentlemen, I am going to tell you the court's construction of the meaning of 'the mouth of a stream' as used in this statute. A stream of water, in the sense of the statute, is water flowing between well defined banks—perhaps I should not use the words 'well defined' for the reason that it might give you a wrong impression—it is water flowing between defined banks—banks that you can see—banks that are perceptible—flowing water confined within banks, as distinguished from water running hither and thither, nowhere and everywhere. If the water is flowing naturally, confined between banks, that is a stream of water in the sense of the statute.
>
> Now, in the case of a stream of water emptying into a bay of the sea, why, the mouth of that stream of water is the end of the stream of

> water at the ordinary low tide of the bay—where the stream joins on to the water of the bay at low tide, that is the mouth of the stream. It is not necessarily at that point where the water is salty, because salt water sometimes runs several miles up a stream; so that is not the criterion—where the salt water meets the fresh water, but it is where the stream as a stream fades away and dissolves—in other words, where the stream loses its identity as a stream with banks confining it, and, as it were, leaps into and becomes a part of the sea."

This construction of the statutes in question has been respected and followed by the courts in Alaska for more than ten years. Fish traps have been erected and maintained; fishing operations have been carried on; and Bureau of Fisheries officials have enforced the statutes in conformance with this construction, for a similar length of time. Furthermore, Congress, in 1924, amended the two sections and again used the phrase "mouth of a stream", presumptively in accordance with the foregoing interpretation. Any other interpretation of the statutes now would seriously affect fishing rights and privileges in this Territory.

> "A construction placed upon a statute by inferior courts and long acquisced in will generally be upheld, especially where the adoption of a different rule would cause great mischief." 36 Cyc. 1143.
>
> "The construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest of-

ficers in the executive department of the government, or has been observed and acted upon for many years, and such construction should not be disregarded or overturned unless it is clearly erroneous." 36 Cyc. 1140.

"Where a statute that has been construed by the courts has been reenacted in the same, or substantially the same, terms, the legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction. So where words or phrases employed in a new statute have been construed by the courts to have been used in a particular sense in a previous statute on the same subject, or one analogous to it, they are presumed, in the absence of a clearly expressed intent to the contrary, to be used in the same sense in the new statute as in the previous statute." 36 Cyc. 1153 (B).

We respectfully contend that this court should affirm the long settled and followed interpretation of the term "mouth of a stream" as that point where fresh waters meet or unite with salt waters at mean low tide.

Assignment 4 is as follows (p. 5 Brief; p. 172 Trans.):

"The Court erred in giving Instruction No. XI to the jury, which is as follows:

'A further question is whether there were any markers on that creek. I charge you that this is not material as to either of these informtions. That clause in Section 3 reading, 'For the purposes of this Section, the mouth of such creek, stream or river shall be taken to be the point determined as such mouth by the Secre-

tary of Commerce and marked in accordance with this determination', is only for the purpose of fixing the mouth of the creek when and as determined by the Secretary of Commerce. The testimony herein shows that the Secretary of Commerce had not fixed the mouth of the creek nor marked it, in which event it becomes a question of fact as to where the mouth of the creek is, to be determined by the jury in each particular case from the evidence and from the instructions given them by the court. If, however, the Secretary of Commerce should determine where the mouth of the creek is and should mark it, then the court would be bound by it; but, not having done so, the court is not bound by it."

The point urged by plaintiff in error is (p. 23 Brief):

> "Was it error for the court to instruct the jury, as in Instruction eleven, in which the court stated that it was not material whether markers were placed on the creek and the mouth determined and marked by the Secretary of Commerce?"

The pertinent provisions of section 3, referred to in Instruction eleven, are as follows:

> "That it shall be unlawful to erect or maintain (certain fishing appliances,including fish traps) within 500 yards of the mouth of any creek, stream, or river into which salmon run. * * * For the purposes of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination. * * *"

Section 4 contains no provisions for determining

and marking the mouth of a stream. The provision for determining and marking the mouth of a stream is pertinent only to section 3. The limiting words are: "For the purpose of this section" (Section 3). Therefore, if in this case there could be no violation of section 3 until the mouth of Lucky Cove Creek was determined and marked by the Secretary of Commerce, the provision cannot affect the conviction in Case No. 1749-B, for a violation of section 4.

Nor, we contend, does the failure to determine and mark the mouth of Lucky Cove Creek affect the conviction in Case No. 1778-B for a violation of section 3.

The violations charged in these cases occurred between July 25, 1924, and August 20, 1924. Section 3 of the White Bill, which contains the provision for determining and marking the "mouth of a stream" for the purposes of section 3, was approved June 6, 1924. Section 3 of the White Bill amended section 3 of the Act of Congress entitled "An Act for the protection and regulations of the fisheries of Alaska," approved June 26, 1906.

Section 3 of the Act of June 26, 1906, (Section 3630 U. S. Comp. Stat. 1916) is as follows:

> "It shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any

> red-salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce (and Labor) is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed."

It is apparent that there was no need to determine or mark the mouth of a stream under section 3 of the Act of June 26, 1906. It is not reasonable to assume that Congress in amending section 3 of the Act of June 26, 1906, by section 3 of the White Bill, intended to leave the amendment inoperative until the Secretary of Commerce, by the Bureau of Fisheries agents, determined and marked the mouths of the thousands of salmon streams in Alaska. It is not reasonable to assume that any stream theretofore protected by section 3 of the Act of 1906 came within the provisions of section 3 as amended by the Act of June 6, 1924, when, and only when, its mouth was determined and marked.

The amendment of section 3 was made for the further protection of salmon. In the amendment, to increase the protection to salmon, the dimensions of the waters protected are increased; the fish protected by the amendment are: all salmon, instead of only red salmon; and new limitations are imposed upon the use of seines and traps. Clearly, the intention was to impose immediate additional protection to the salmon fisheries of Alaska.

Therefore, we assume, Congress intended that section 3 as amended, when it became effective became immediately operative as a protective measure. It was not humanly possible for the Bureau of Fisheries to immediately determine and mark the mouths of all the creeks, streams, and rivers of Alaska in which salmon run. In the meantime, that is, until the mouths of such creeks, streams and rivers are determined and marked, we contend that under section 3, as amended, the mouth of a creek, stream, or river into which salmon run, emptying into salt water, is the point where fresh water meets salt water at mean low tide.

The crime defined in section 3 is obstructing a salmon stream within 500 yards of its mouth. It is not that of obstructing a salmon stream whose mouth has been determined and marked. Booth Fisheries Company was convicted of the crime of obstructing a salmon stream within 500 yards of its mouth, and, we submit, the Company is just as guilty of violating the provisions of section 3 as though the Secretary had determined and marked the mouth. To hold the contrary is just as unreasonable, in theory as in fact, as to assume that Lucky Cove Creek had no mouth because the mouth had not been determined and marked.

We believe that Congress intended, by the provisions of Section 3 for marking the mouths of streams, to afford the Bureau of Fisheries officials an opportunity to cover just such situations as coun-

sel describes at page 23 of his Brief.

When Bureau officials determine and mark a point as the mouth of a stream, the marker governs. When the mouth has not been determined and marked, it is a question of fact for the jury to determine the point or place where fresh waters of the stream meet salt water at mean low tide. This point or place is, as a matter of law, the mouth of the stream.

We conclude, therefore, that the court, by Instruction eleven, correctly stated the law of the case.

ARGUMENT.

ASSIGNMENTS 1, 2, 5, 6, 7, AND 8.

The plaintiff in error, Booth Fisheries Company, by the assignment of errors, sets up eight separate grounds of error. They are set up in the brief (pp. 4-9) in the exact words of the assignment of errors. Only two of the objections so assigned are argued in the brief, and, we conclude, therefore, that all of the assignments excepting numbers three and four are waived. The rule of law in such cases is set out in 17 C. J. (Criminal Law) 212, Section 3559, as follows:

> "As a general rule questions assigned as error by appellant are deemed to be abandoned or waived, where they are not urged in his brief or argument, and will not be reviewed, unless the error is a fundamental one, or is so patent that no argument is needed to demonstrate it."

Great Northern Railway Company v. U. S. 208 U. S. 452, 28 Sup.Ct. 313;

May v. U. S. (C C A 8) 236 Fed. 495;

Meyers v. Morgan (C C A 8) 224 Fed. 413.

And in 17 C. J. (Criminal Law) p. 189, Section 3498:

> "Courts are entitled always to a conscientious and earnest effort on the part of counsel to aid them in the decision of cases, and the rule is well settled that, in addition to specifying the alleged error complained of, the brief should state reasons to show why the rulings complained of are erroneous. It is not sufficient merely to call attention to alleged errors and recite that they are such. Ordinarily the court will consider as waived all assignments of error in support of which no reasons are stated, unless the error is so glaring or patent that no argument is needed to demonstrate it."

No reasons are given in support of the alleged errors designated as assignments one, two, five, six, seven and eight. All of the alleged errors, excepting three and four, should be considered as waived.

If the court should consider the unargued assignments, they are not well taken.

Assignment One (p. 4 Brief; p. 171 Trans.) is as follows:

> "The District Court erred in overruling the objection of the defendant to the question propounded to the witness, Iver N. Stensland, by the United States Attorney, as follows:
>
> 'Now what was the effect of this trap being in this position with reference to salmon approaching the stream?' "

The assignment is insufficient. It is too general, and does not comply with Rule 11 of this court. As stated in Walton v. Wild Goose Mining Company (C C A 9), 123 Fed. 209:

> "The Circuit Court of Appeals have repeatedly called the attention of counsel to the absolute necessity of adhering to the terms of Rule 11 * * * * concerning assignments of errors. * * * * The object of the rules is to so present the matter raised by the assignment of error that this court may understand what the question is it is called upon to decide without going beyond the assignment itself, and also that the party excepting may be confined to the objections taken at the time, which must then have been stated specifically. The party complaining of the action of the lower court must lay his finger upon the point of objection and must stand or fall upon the case he made in the court below. Appellate courts are not the proper forum to discuss new points. They are simply courts of review to determine whether the rulings of the court below, as presented, were correct or not."

Ulmer v. U. S. (C C A 6, 1915) 219 Fed. 647;

U. S. v. Percansky (D. C. Minn. 1923) 298 Fed. 995.

Examination of the transcript (pp. 92-93) shows that the court properly overruled the objection. One of the material facts in Case 1778-B was whether this fish trap prevented or impeded the ascent of salmon to the spawning grounds in Lucky Cove Creek (Information p. 5 Trans.) The question. "What was the effect of this trap being in this po-

sition with reference to salmon approaching the stream?" was material and relevant; and the answer (p. 92-93 Trans.) certainly tended to prove this essential fact. No objection was made to the answer, and the court was not asked to strike it out. Practically the same question was again asked the witness (p. 93 Trans.) and no objection was made to the question or to the answer.

Furthermore, the objection was not raised in the motion for a new trial (p. 150 Trans.), and it is fundamental that alleged errors and previous exceptions not incorporated in the motion for new trial are considered as waived.

17 C. J. 86, 87, Section 3349.

17 C. J. 89, Section 3350.

Balboa v. U. S. (C C A 9) 287 Fed. 125.

Assignment Two is as follows:

> "The District Court erred in sustaining the objection to the question propounded by defendant's counsel to the witness Iver Thue, as follows:
>
> 'Did you see at any of those times any seine fishermen fishing between the trap and the mouth of the creek.' "

This unargued assignment is not well taken. Examination of the Transcript (p. 103) discloses the fact that the witness was allowed to and did answer the question before objection was made by the government. The answer was, "Yes, sir," and it was not stricken out; consequently the defendant could

not have been prejudiced by the court's ruling in sustaining the government's objection to defendant's question. In view of the amendment of Section 269 of the Judicial Code (Comp. Stat. Ann. Supp. 1919, Section 1246) there was no prejudice to the substantial rights of plaintiff in error, and the pretended error should be disregarded.

Dye v. U. S. 262 Fed. 8 (C C A 4, 1919).

Dupree v. U. S. 2 Fed (2d) 44 (C C A 9, 1924).

Atwell (3d Ed.) Fed. Crim. Law & Proc. p. 122.

Assignments 3 and 4, being the assignments argued in plaintiff in error's brief, were answered in the first part of this brief.

Assignment 5 (p. 6 brief, p. 173 Trans.) is as follows:

> "The District Court erred in giving Instruction No. XII, which read as follows:
>
> 'Now, as to the question of notice to the defendant, that is not a material question in this case. Each offense in this case is what in law is called a malum prohibitum. The question of the good faith of the defendant does not arise in this case at all. The law provides that the defendant shall do certain things and the defendant is supposed to have notice of what the law provides. He is presumed to know the law, and where an act is prohibited which is not in itself immoral or wrong, it is termed a malum prohibitum and the defendant must do as the law requires him to do, whether his intention was to violate the law or not.' "

This assignment is not well taken. It is not argued

in the brief, and no specific objection was made, when the exception was taken (p. 146 Trans.); or in the assignment of errors (p. 173 Trans.); or in the brief (p. 6 Brief). Counsel's pretended objection to the instruction (p. 146 Trans.) is as follows:

> "The defendant excepts * * * to the instruction that no notice was required to be given the defendant and that the good faith of the defendant does not arise at all."

It is apparent that no objection was offered to the instruction at all. The rule in such cases is stated in 17 C. J. 64, Section 3333, as follows:

> "The general rule is that objections to instructions not made at the trial court cannot first be raised on appeal."

And in 17 C. J. 68, Section 3335, the authors say:

> "Usually a general objection to the ruling of the court will not be reviewed, but the objection must point out specifically the particular grounds upon which error is alleged to have occurred. Thus a general objection to an instruction given in a criminal case will not be considered on appeal, especially where some of the instructions are correct."

And in 17 C. J. 184, Section 3485, the authors say:

> "To obtain consideration in the reviewing court assignments of error in respect of instructions given or refused must specifically point out the errors relief on. Ordinarily, on noncompliance with the rule, a court will refuse to consider the assignments."

Furthermore, the instruction correctly states the law of the case. Circuit Judge Gilbert, in Thlinget

Packing Company vs. United States (C C A 9, 1916) 236 Fed. 113, said as follows:

> "Where the offense is malum prohibitum, the doing of the inhibited act constitutes the crime. The only fact to be determined by the jury is whether the accused did the act. No evil intent is essential to constitute the offense. A simple purpose to do the forbidden act is sufficient."

Farnham, Vol. 2 on Waters and Water Rights, p. 1415, Sec. 392, says:

> "Violations of fish and game laws belong to the class of actions of which intent is not necessary to constitute a part of the offense. The doing of a certain act is forbidden by the statute, and it is enough that one has committed such acts to render him subject to the penalty, although he did not know that he was violating the law and had no intention of doing so."

State v. Cherry Point Fish Co. 72 Wash 420; 130 Pac. 501;
16 C. J. 76, Section 42.

Assignment Six (p. 6 Brief; p. 173 Trans.) is directed to the court's failure to give defendant's proposed instruction No. 2. The proposed instruction, after quoting Section 3 of the Act of June 6, 1924, commonly known as the White Bill, is as follows:

> "You are instructed that in this case, unless it has been shown that the Secretary of Commerce, or some one under his direction, determined and marked the point designated as the mouth of the stream in question, you must find the defendant not guilty."

This assignment is not well taken. It is not argued

in the brief. The instruction is erroneous on its face, for, even though Section 3 requires the mouth of a stream to be marked, there is no such requirement under Section 4. The defendant was prosecuted under Section 3 (Case No. 1778-B) for unlawfully erecting and maintaining a fish trap on July 25, 1924, within 500 yards of the mouth of Lucky Cove Creek with the purpose and result of capturing salmon and preventing and impeding their ascent to the spawning grounds; and under Section 4 (Case No. 1749-B) (the two cases were consolidated for trial) for unlawfully fishing for and taking salmon for commercial purposes, from July 26, 1924, to August 20, 1924, within 500 yards of the mouth of a stream into which salmon run, to-wit, Lucky Cove Creek. Section 3 contains a provision that "For the purposes of **this section,** the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination."

Section 4 is silent as to any designation of the mouth of a stream by markers. Even though the proposed instruction was a correct statement of the law as to Case 1778-B under Section 3, it was not a a correct statement as to Case 1749-B under Section 4. Therefore, the proposed instruction, if given, would necessarily have resulted in a verdict of not guilty in Case 1778-B under Section 3, and also in

Case 1749-B, under Section 4, for in neither case was the mouth of the stream marked by the Secretary of Commerce.

If the proposed instruction correctly stated the law as to Case 1778-B under Section 3, it should have been limited to such case and section. It did not apply to Case 1749-B under Section 4. For this reason alone the lower court correctly refused the instruction.

The rule in such cases is set out in 16 C. J. (Criminal Law) 1036, Section 2477:

> "An instruction, whether given by the court of its own motion or requested, is erroneous and should not be given where it is calculated to confuse or to mislead the jury, as where it requires explanation or qualification."

And in 16 C. J. (Criminal Law) p. 1066, Section 2507:

> "Where a requested instruction is erroneous either wholly or in part it properly may be refused, as where it embodies both a correct and and incorrect proposition of law."

The court correctly instructed the jury, as to the mouth of the stream and as to the markers, in instructions seven and eight (pp. 140-141 Trans.) as we have heretofore pointed out in answering assignments 3 and 4.

Assignment Seven (p. 8 Brief; p. 175 Trans.) is directed to the court's failure to give defendant's proposed instruction No. 3, which proposed instruction is in the following words:

> "You are instructed that in order to find the defendant guilty, it is necessary for the government to prove that the stream in question was a stream or creek into which salmon ran prior to August 20, 1924; and if the government has not proved that salmon ran into this stream, or in other words, that this was a creek into which salmon ran between the 3rd day of July and the 20th day of August, 1924, your verdict must be not guilty."

The assignment is not well taken. It is not argued in the brief. The proposed instruction is erroneous on its face, for neither Section 3 nor Section 4 qualifies by periods or seasons the streams protected.

The violation charged in Case 1778-B, under Section 3, is of July 25, 1924. The violation charged in Case 1749-B, under Section 4, is on July 26, 1924, and continuously to and including August 20, 1924. The jury by their verdict found that the defendant did obstruct the stream and did illegally fish on the dates charged.

The evidence clearly shows (p. 59-93,102 Trans.) that Lucky Cove Creek was a stream into which salmon ran. The court's instruction 5 (p. 140 Trans.) correctly stated the law of the case as follows:

> "A stream into which salmon run, according to the statute as I interpret it, is a stream into which salmon are accustomed to run not at any particular time, but one into which salmon run at one interval or at another interval."

The court by instruction 5 also directed the jury to find as a fact whether Lucky Cove Creek was a

creek into which salmon run.

The defendant, by the proposed instruction, no doubt had in mind the idea that the jury could not find as a fact that salmon ran into Lucky Cove Creek between July 3 and August 20, 1924, the period during which the fish trap was installed there. He must have been seeking to take advantage of the following testimony given by Warden Stensland (pp. 92-93 Trans.):

> "I was in Lucky Cove on those occasions (July 23, 24, 31, August 6, 7, September 11, 12, 14 and 15, 1924) examining the trap and the stream. I saw fish schooling around the bay, or in the cove, in front of the trap, or in front of the mouth of the creek, and on the same occasions I didn't see any fish going up the stream because the trap was catching the fish that was acclimatizing themselves around the mouth of the stream. They were coming from the salt water and naturally they couldn't stand the sudden change from salt water to fresh water * * * This trap was so close to it (Lucky Cove Creek) that they were getting caught, and that's the reason there was no fish in the mouth of the stream, and I didn't expect to find any while the trap was there because that's the way it was last year."

In answer to the question: "What was the effect after this trap was removed and you went to the trap on September 11th, 12th, 14th and 15th?", the same witness testified (p. 93 Trans.) that he found salmon in Lucky Cove Creek. There was other abundant evidence that salmon ran into Lucky Cove

Creek at different intervals during the year. (Trans. 59, 93, 102.)

Clearly, the proposed instruction which would have required the government to prove that salmon ran into Lucky Cove Creek between July 3 and August 20, 1924, when the trap was capturing all the salmon which would have gone into the Creek, before the jury could find that Lucky Cove Creek was a creek into which salmon run, was not only unreasonable in fact but is also unreasonable in law.

Assignment Eight (p. 8 Brief; p. 175 Trans.) is as follows:

> "The court erred in overruling the defendant's motion for a new trial."

The order overruling the motion for a new trial is set out in full on page 166 of the transcript. It appears therefrom that the motion was argued before the court by counsel for the defendant; and that the court fairly heard, and fully understood and considered, the motion and the reasons advanced in support of it. It clearly appears that the court exercised its discretion in the matter. In the exercise of the discretion, vested in the court by law, the motion was overruled because the court did not believe the defendant was entitled to a new trial. No abuse of the court's discretion is urged by the defendant.

It is elementary that a motion for a new trial is addressed to the sound discretion of the trial court.

The overruling of such a motion is not reviewable, except for an abuse of discretion.

Smith v. U. S. 231 Fed 32 (C C A 9)
Leuders v. U. S. 210 Fed. 419 (C C A 9)
Kettenback v. U. S. 202 Fed. 377 (C C A 9)
Hedderly v. U. S. 193 Fed. 561 (C C A 9)
Dwyer v. U. S. 170 Fed. 165 (C C A 9)
McDonnel v. U. S. 133 Fed. 293 (C C A 9)

It appears to us, therefore, that not one of the six unargued assignments of error is well taken.

Before concluding our brief, we are of the opinion that a few points made by plaintiff in error, although irrelevant, ought to be briefly answered.

It is rather fallaciously argued(p. 24 plaintiff's brief) that the Bureau agents, in 1923, determined, but did not mark, a point at high tide line as the mouth of Lucky Cove Creek; and in 1924 they changed the mouth of the creek to a point at low tide, but they did not mark the point; yet it is also argued that the mouth of a creek cannot be fixed unless it is determined **and marked.** We are of the opinion that no further discussion is necessary to explain the fallacy of the contention that the mouth of Lucky Cove Creek was determined at high tide line in 1923, and changed to a point at low tide in 1924 without notice to plaintiff in error.

The fact that Bureau officers took some measurements in 1923, and did not immediately thereafter

prosecute the Company does not raise any inference that the officers determined the mouth of the stream to be at high tide line and the trap not within the prohibited distance, as argued by plaintiff in error.

The fact that this company violated the law at Lucky Cove for eight years before they were apprehended and prosecuted is no circumstance in their favor, as counsel would seem to contend. And, because the violations were not prosecuted until 1924, does not support the theory that the trap was maintained at Lucky Cove with the sanction of the officials of the Department of Commerce for eight years.

We believe that the foregoing points made by plaintiff in error are of no assistance to this court in determining whether the lower court erred.

CONCLUSION

We submit, therefore: that the lower court correctly instructed the jury, in Instruction seven, that the mouth of a stream is the point or place where the fresh waters of the stream meet tide water at mean low tide, and, therefore, the points set up in assignment No. 3 are not well taken; that the lower court correctly instructed the jury, in Instruction eleven, that it was not material that the mouth of Lucky Cove Creek had not been determined and marked by the Secretary of Commerce, and

therefore, the points set up assignment No. 4 are not well taken; that because assignments one, two, five, six, seven, and eight are not argued, they are waived and should not be considered; that, if the court should consider them, not one of such assignments is well taken.

Wherefore, the case made in the lower court ought to be affirmed.

Respectfully submitted,

ARTHUR G. SHOUP,
United States Attorney.

HOWARD D. STABLER,
Asst. U. S. Attorney.

NO. 4504

In The

United States Circuit Court of Appeals

For the Ninth Circuit

BOOTH FISHERIES COMPANY, a corporation, Plaintiff in Error, vs. THE UNITED STATES OF AMERICA, Defendant in Error.	}

Upon Writ of Error to the United States District Court for the Territory of Alaska, Division Number One.

Petition for Rehearing

ARTHUR G. SHOUP,
United States Attorney,

HOWARD D. STABLER,
Asst. U. S. Attorney,

For Defendant in Error.

NO. 4504

In The

United States Circuit Court of Appeals

For the Ninth Circuit

BOOTH FISHERIES COMPANY,
a corporation,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Division Number One.

Petition for Rehearing

ARTHUR G. SHOUP,
United States Attorney,
HOWARD D. STABLER,
Asst. U. S. Attorney,
For Defendant in Error.

In The

United States Circuit Court of Appeals

For the Ninth Circuit

BOOTH FISHERIES COMPANY,
a corporation,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Division Number One.

Petition for Rehearing

Comes now the United States of America, defendant in error, and respectfully petitions this honorable court for a rehearing herein on the ground that Congress intended sections 3 and 4 of the Act of June 6, 1924, commonly known as the White Bill, and in particular those provisions of said sections pertaining to obstructions and to fishing operations within 500 yards of the mouths of streams into which salmon run, to become operative and effective to protect salmon at the mouths of streams on June 6, 1924, and not when, and only when, after June 6, 1924, the mouths of such streams could be

determined and marked by the Secretary of Commerce.

The Court in its opinion says:

> "The court below was of the opinion that the amendment of 1924, providing that the mouth of a stream shall be taken to be the point determined as such by the Secretary of Commerce and marked in accordance with his determination, made no change in the then existing law, unless and until the Secretary of Commerce saw fit to exercise the authority thus conferred. In other words, that the question whether the law has been changed or not depends not upon the law itself but upon the action or inaction of the Secretary of Commerce."

The court in its opinion says that it cannot agree with the lower court's construction that whether the law was changed or not depends not upon the law itself but upon the action or inaction of the Secretary of Commerce, YET THE COURT HOLDS THAT THE VERY LAW ITSELF IS OPERATIVE OR INOPERATIVE DEPENDING UPON THE ACTION OR INACTION OF THE SECRETARY.

It is very evident that we did not make our views in this respect clear to the court for we do not contend that the law has not been changed. Our contention is that the statutes referring to the mouths of creeks, streams and rivers, including the provision for the determination of the mouth by the Secretary, became effective June 6, 1924, when the law was approved; that a creek, stream or river con-

tinued to have a mouth for the purposes of these sections even though the point or place where the mouth was had not been determined and marked by the Secretary; that for the purpose of the sections the mouth of a creek, stream or river emptying into tidewater is the point or place where the fresh waters of the stream unite with the salt waters of the sea at mean, that is, the average, low tide, where the courts of the Territory, Bureau of Fisheries officials and fishermen since the passage of the Act of June 26, 1906, had supposed it was; and that the duty of determining and marking this point or place, in order to designate it and thus make it more definite and certain of location by fishermen, was imposed upon the Secretary; and that the Secretary had authority by the new statute to depart from the theretofore accepted definition of the mouth of a stream and determine and mark, in the sense of establish and mark, another point or place as the mouth of a stream, if in his discretion exercised in good faith salmon could be more adequately protected.

If the provisions for protecting the mouths of salmon streams under the Act of June 6, 1924, become operative only when the mouths of such streams are determined and marked, and the protection afforded by the amended sections of the Act of 1906 ceased on June 6, 1924, as indicated by the court's opinion, the Secretary of Commerce, by withholding action, would have the power to nullify

the express intent of Congress to protect the mouths of salmon streams; the statutes would become operative to protect the mouths of salmon streams from day to day as the Bureau of Fisheries determined and marked each stream; obstructions and fixed and movable fishing gear could be kept and maintained lawfully within 500 yards of the mouths of salmon streams in direct opposition to the intent and will of Congress, as expressed in sections 3 and 4 until the Secretary could act; instead of making the point or place of the mouth of a stream definite and certain, there would in the meantime be nothing definite or certain, for, until the Secretary could act, a stream would in fact have a mouth, but in theory it would have no mouth at all; and the express intent of Congress to protect the mouths of salmon streams would have been disregarded, at least temporarily.

The court in its opinion says:

> "Congress might itself define the mouth of a stream or it might delegate that authority to the Secretary of Commerce, or some other officer. It chose the latter course here and the determination of the Secretary of Commerce, WHEN MADE, has the force and effect of law."

We thoroughly agree with the statement that the Secretary's determination and marking of the mouth of a stream, WHEN MADE, has the force and effect of law. But in the meantime, until a determination and marking IS MADE, the provisions of sections 3 and 4, pertaining to the mouths of

streams, according to the opinion, are not in operation at all. Such interpretation of the statutes appears to us inconsistent with the intention of Congress, in amending the Act of 1906, to more adequately protect the salmon supply of Alaska.

Since the passage of the Act of 1906, the courts of Alaska, the Bureau of Fisheries officials and fishermen have considered the mouth of a stream emptying into tide water as that point or place where the fresh waters of the stream unite with salt waters of the sea at mean, that is, the average, low tide. Although the mouths of salmon streams were not determined or marked under the Act of 1906, the mouths of such streams were, nevertheless, under this interpretation of the amended statutes, established, and were fairly definite and certain of determination in any particular case. We believe that Congress in passing the amendatory statutes of 1924 were well acquainted with this interpretation of the amended statutes. We believe that Congress, in amending the statutes of 1906 by adding the words: "For the purposes of this section, the mouth of such creek, stream or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and marked in accordance with this determination", imposed upon the Secretary the duty of determining and marking the point or place where the fresh waters of a stream united with the salt waters of the sea at mean low tide in order to make such point or place more definite and cer-

tain for fishermen; and that authority was also given to the Secretary to depart from the theretofore accepted definition of the mouth of a stream and determine, in the sense of establish, and mark another point or place as the mouth of such a stream, if in his discretion exercised in good faith salmon could be more adequately protected.

Such a construction of the statute would not conflict with this court's opinion where it is said:

> "A point five hundred yards from the place where the fresh and salt waters meet at low tide might in some cases be less than five hundred yards from the point where the stream enters the cove, and it may well be that the purposes of the statute would be best subserved by locating the mouth of the stream at the point where it enters the cove, rather than at the point on the tide flats where the fresh and salt waters meet at low tide."

The lower court in instructing the jury that it was not material as to either information whether the mouth of the stream had been determined or marked by the Secretary of Commerce or not, did not mean that the provision for determining and marking the mouths of streams was of no effect, or that the law had not been changed. The lower court did mean that it was illegal to obstruct or fish a salmon stream within 500 yards of its mouth whether the mouth was determined and marked or not; and, until the Secretary determined and marked the mouth, the mouth was where the courts of Alaska, the Bureau officers and fishermen had for eighteen years sup-

posed it was. In the meantime, that is, until the Secretary acted, the lower court by its instruction affirmatively carried out the intention of Congress to protect the salmon supply from utter depletion.

Our contention in this respect does not conflict with the court's opinion where it is said:

> "It is suggested by counsel that these objections do not extend to the information based on section 4 of the Act, because that section does not contain the provisions that the mouth of a stream is the point determined to be such by the Secretary of Commerce, but, in our opinion, Congress never contemplated that a stream could have two mouths for the purposes of the Act; one to be determined and marked by the Secretary of Commerce, the other to be fixed or ascertained by the court or jury. If the contention of counsel is correct, the trap might be lawfully maintained under section 3, but could not be lawfully used or operated under section 4."

Our contention makes it illegal to obstruct a salmon stream within 500 yards of its mouth under section 3, or to fish for salmon within five hundred yards of its mouth under section 4, from the day of the adoption of the Act of 1924, to wit, June 6, 1924, and until the Secretary of Commerce determines and marks the mouths of such streams; that when the mouth of each stream is determined and marked, the old interpretation must give way and the Secretary's determination and marks govern.

That the intention of Congress was to continue to protect the mouths of salmon streams in Alaska im-

mediately and not dependent upon action or inaction of the Secretary of Commerce is clear. For some time prior to the passage of the Act of 1924, Congress was confronted by the fact that the fisheries of Alaska were being rapidly depleted. On April 22, 1924, in a report by the Senate Committee on Commerce, to accompany H. R. 8143 (Act of June 6, 1924) it was said:

> "All who have studied the situation and are interested in a permanent supply of fish are a unit in contending that depletion of the salmon supply has already occurred, and that the utter destruction of the industry will follow if real remedial measures are not promptly taken.
>
> "The waters of Alaska are so vast and the local conditions so varied that it is utterly impossible to prescribe by legislation in detail the provisions necessary to meet each situation. To attempt to do so would be to defeat the purposes sought. This can be done by placing broad powers and a wide discretion in the administrative branch having charge of the subject.
>
> "This Act (Act of 1924) is not perfect. It does not wholly satisfy anybody. We are sure, however, that it is a very substantial move in the right direction. If it can be passed and ample provisions made to carry it out, the Alaska fisheries will be permanently maintained."

From the foregoing, we feel reasonably certain that the intent of Congress in amending sections 3 and 4 of the Act of 1906, by the Act of 1924, was to protect more adequately the salmon in Alaskan waters. We feel equally confident in saying that the intent of Congress in amending sections 3 and 4

NO. 4504

In The

United States Circuit Court of Appeals

For the Ninth Circuit

BOOTH FISHERIES COMPANY,
a corporation,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Territory of Alaska, Division Number One.

Petition for Rehearing

ARTHUR G. SHOUP,
United States Attorney,
HOWARD D. STABLER,
Asst. U. S. Attorney,
For Defendant in Error.

determination and marks govern the situation. To hold otherwise would be placing a premium on form, and minimizing, if not destroying, the effect and value of substance.

We urge this rehearing because the matter presented is of the greatest importance to the fishing industry in the Territory. In fact, the seriousness of the situation is such that it cannot be overstated; and not having made ourselves sufficiently clear upon the previous hearing touching the exact point we desire to urge, we respectfully ask for a rehearing in order that our contention may be more fully and more clearly stated.

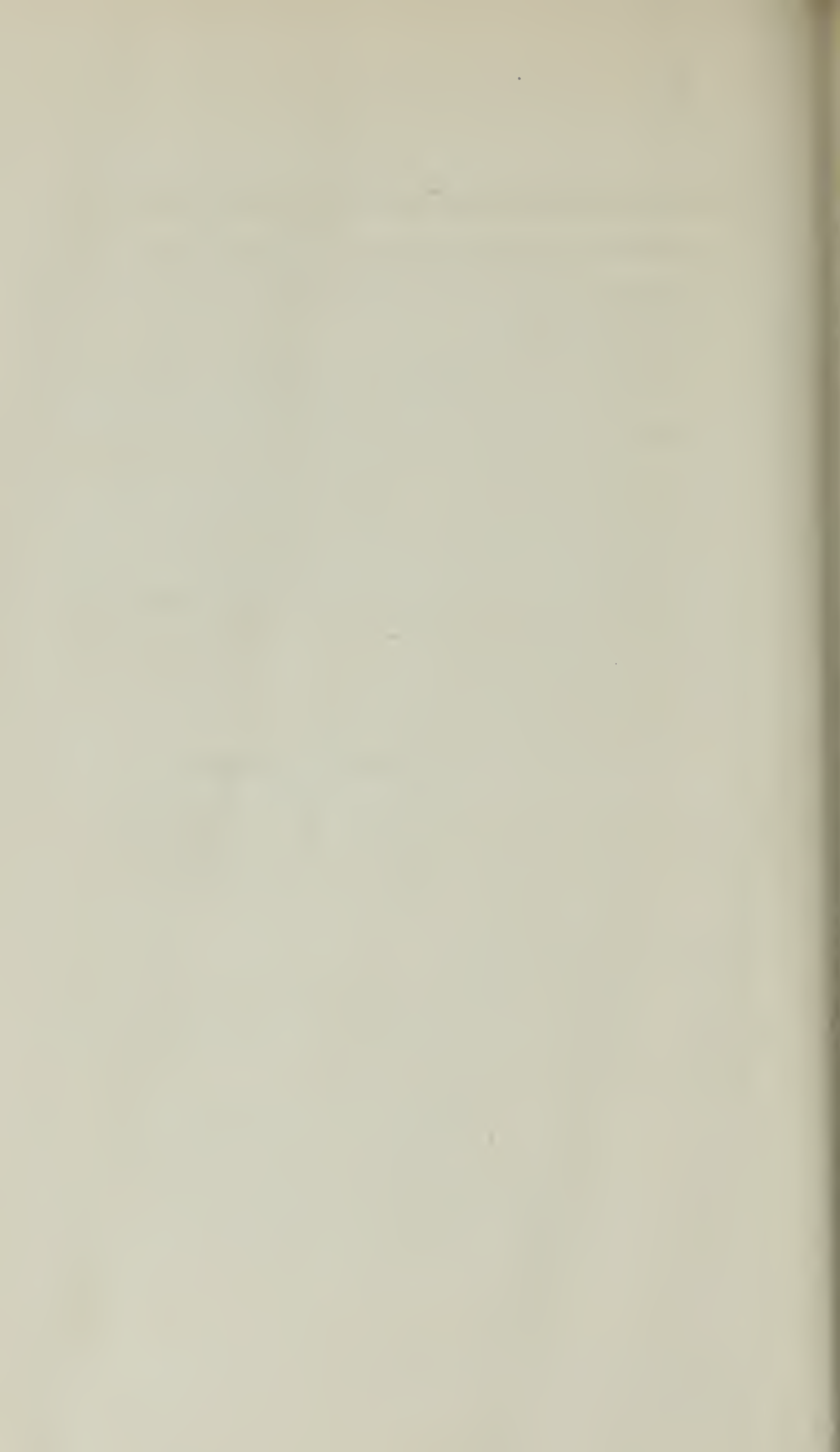
Respectfully submitted,

ARTHUR G. SHOUP,
United States Attorney,
HOWARD D. STABLER,
Asst. U. S. Attorney,

Certificate of Counsel:

We hereby certify that in our judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

ARTHUR G. SHOUP,
United States Attorney,
HOWARD D. STABLER,
Asst. U. S. Attorney.



was to continue immediate prohibition against obstructions and fishing operations within 500 yards of the mouths of all creeks, streams and rivers into which salmon run. We think the statutes should be so construed as to carry out the intent of Congress.

The authors of 36 Cyc. 1106, say:

> "The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature."

And in the same volume at page 1111:

> "Where the proper construction of a statute is otherwise doubtful, arguments from the inconvenience, absurdity, injustice, or prejudice to the public interests, resulting from a proposed construction, may be considered."

The authors of 25 R.C.L. 960, section 216, say:

> "In the interpretation and construction of statutes the primary rule is to ascertain and give effect to the intention of the legislature. As has frequently been stated in effect, the intention of the legislature constitutes the law. All rules for the interpretation and construction of statutes of doubtful meaning have for their sole object the discovery of the legislative intent, and they are valuable only in so far as, in their application, they enable us the better to ascertain and give effect to that intent. Even penal laws, which it is said should be strictly construed, ought not to be so construed as to defeat the obvious intention of the legislature."

At page 1012, section 252, the same authors say:

> "In construing a statute, the intention of the legislature is to be ascertained not merely from the language of the act taken as a whole, but,

where the language is not free from ambiguity, from the application of the act to existing circumstances and necessities. Where the words of a statute are not explicit, the intention of the legislature is to be collected from the context, by considering the subject matter, by looking to the occasion and necessity for the law and the circumstances under which it was enacted, to the mischief to be remedied, the object to be attained and the remedy in view, by comparing one part with the other and giving effect to the whole, by looking to the old law upon the subject, if any, and to other statutes upon the same or similar subjects, BY CONSIDERING THE EFFECTS AND CONSEQUENCES OF A PARTICULAR CONSTRUCTION, and by looking to contemporaneous construction of the statute."

Again, at page 1013, section 252, the same authors say:

"The language of a statute must be read in a sense which harmonizes with the subject matter and the general purpose and object of the statute * * * * The general design and purpose of the law is to be kept in view and the statute given a fair and reasonable construction with a view to effecting its purpose and object, EVEN IF IT BE NECESSARY, IN SO DOING, TO RESTRICT SOMEWHAT THE FORCE OF SUBSIDIARY PROVISIONS THAT OTHERWISE WOULD CONFLICT WITH THE PARAMOUNT INTENT. AN INTERPRETATION WHICH DEFEATS ANY OF THE MANIFEST PURPOSES OF THE STATUTE CANNOT BE ACCEPTED. Every statute, it has been said, should be construed with a reference to its object, and the will of the lawmakers is best promoted by such a construction as

secures that object and excludes every other."

At page 1015, section 254, it is said:

"* * * * Although a penal statute cannot be extended by construction, it should, if possible, receive such a construction as, when practically applied, will tend to suppress the evil which the legislature intended to prohibit."

At page 1018, section 256, it is said:

"When the language of a statute fairly permits, a construction which will lead to an unreasonable result should be avoided."

At page 1017, section 255, it is said:

"* * * * When a statute is ambiguous in terms or fairly susceptible of two constructions, the injustice, unreasonableness, absurdity, hardship, or even the inconvenience which may follow one construction may properly be considered and a construction of which the statute is fairly susceptible may be placed on it that will avoid all such objectionable consequences and advance what must be presumed to be its true object and purposes."

In the case of Thiele v. City of Philadelphia (Supreme Court of Pennsylvania, 1914), 91 A. 490, the court says:

"We have already indicated that the act of 1913 did not go into operation automatically, but that it required definite action upon the part of the city councils to make it effective. It did contain a repealing clause, the effect of which must now be considered. If it repealed all former laws inconsistent with its provisions as of the date of its approval, and the new law for the reasons above stated is not in force, it would necessarily follow that the city is without

> any law regulating sanitary inspection at the present time. If such a result necessarily followed, it would be most unfortunate; but, according to our view of the law it is not necessary to so hold.
>
> "It is well settled that where the provisions of a revising statute are to take effect at a future period, or upon the happening of a certain contingency, or the doing of certain acts, and the statute contains a clause repealing former laws on the same subject, the repealing clause does not take effect until the provisions of the repealing act go into operation. (Citing authorities) * * * * Many other authorities might be cited to the same effect.
>
> "* * * * The same may be said of the case at bar. The old law remains in force until it is superseded by the organization of the division of housing and sanitation under the act of 1913, and the repealing clause of this act does not take effect until the new law goes into operation."

If the foregoing authorities correctly state the law, we think the interpretation of the mouth of a stream under the Act of 1906 should continue in full force and effect until the Secretary of Commerce determines and marks the mouths of salmon streams according to the provisions of the Act of 1924. We cannot think of any other interpretation of the statutes of 1924 that will give force and effect to the intent of Congress to immediately further protect the salmon supply at the mouths of salmon streams in Alaskan waters.

Congress must have known that the waters of Alaska are vast; that the land area is equal in size

to one-fifth of the land area of the United States; that the coast line of Alaska extends over approximately twenty-five hundred miles; and that there are thousands of creeks, streams and rivers in Alaska into which salmon run. The fact that it would take the Secretary of Commerce some considerable time after the Act of 1924 became effective to determine and mark the mouths of salmon streams must, also, have been known. Congress must have realized that if these provisions were to become operative and effective only when the Secretary acted there was no protection to salmon at the mouths of streams under the new Act of 1924 until the Secretary could act, unless protection under the Act of 1906 was continued in effect. It seems so plain as to be beyond contradiction, that Congress did not intend to leave the mouths of salmon streams after June 6, 1924, dependent for protection upon the future acts of the Secretary of Commerce.

For these reasons we respectfully contend that the lower court correctly instructed the jury to the effect that it was not material, as to the two informations against Booth Fisheries Company, whether the mouth of Lucky Cove Creek had been determined or marked by the Secretary; that when the mouth was determined and marked the determination and marks govern; that in the absence of such determination and marking, the place or location of the mouth of the Creek was a question of fact for the determination of the jury, under the instruc-

tions of the court, and:

> "To this end, I charge you that the mouth of a stream emptying into tidewater, is the point or place where the waters of the stream meet tidewater at mean low tide. It is not where the waters of the stream meet tidewater at high tide, but where the waters of the stream meet tidewater at mean—that is, the average—low tide."

The jury found as a fact that Lucky Cove Creek was a creek into which salmon ran. The creek surely had a mouth even though the point or place where the mouth was had not been determined and marked by the Secretary of Commerce. Congress by the Act of 1906, and also by the Act of 1924, made it unlawful to erect or maintain obstructions, or to fish for or take salmon, within 500 yards of the mouth of a salmon stream; and, we think, this protection was not qualified or limited to salmon streams the mouths of which would at some future time be determined and marked by the Secretary of Commerce. Booth Fisheries Company erected and maintained an obstruction on June 25, 1924, and fished for and took salmon on July 26, 1924, and thereafter, within 500 yards of the point or place where the fresh waters of Lucky Cove Creek united with the salt waters of Lucky Cove at mean low tide, the point which, in Alaska, for eighteen years had been considered the mouth of a creek emptying into the sea. Yet the court's opinion holds in effect that because the mouth of Lucky Cove Creek had not been deter-

mined and marked Lucky Cove Creek had no mouth at all; and that it was not unlawful to do these acts (presumably after June 6, 1924) because the Secretary had not determined and marked where the mouth was; or if he had determined where the mouth was that he had not placed some kind of a mark there to designate it; or, because the mouth had not been determined and marked, that it was uncertain where the mouth was.

The court says in the opinion:

> " * * * In any event, the place where the mouth of the stream shall be located rests in the discretion of the Secretary of Commerce, and the location of the mouth of the stream by the Secretary is indispensable to give certainty and precision to the statute. Until that has been done, the initial point from which measurements are to be made cannot be known, and without an initial point from which to measure it would, of course, be impossible to determine the boundaries of the prohibited area."

Booth Fisheries Company knew where the mouth of Lucky Cove Creek was, for this Company pleaded guilty to a charge of illegal fishing on October 1, 1923, and was fined $400 for fishing by means of a fish trap within 500 yards of the mouth of Staney Creek on Prince of Wales Island (Case No. 822 KB, District Court, First Division, District of Alaska); and the mouth of Staney Creek was where the creek waters of Staney Creek united with the salt waters of Tuxecan Passage at mean low tide. There was nothing indefinite or uncertain about where the

mouth of Staney Creek was. There have been many similar cases in the First Division of Alaska and there has never heretofore been any uncertainty about determining the point or place where the mouth of a salmon stream emptying into salt water was. It may be that in this case the equities of the situation entitle Booth Fisheries Company to mitigating consideration. But the equities or mitigating circumstances of the case, if there are any, do not affect the guilt or innocence of an offender in this kind of case. The doing of the inhibited act constitutes the crime. Thlinket Packing Co. vs. United States (CCA-9, 1916) 236 Fed. 113.

To say that the provisions of amending sections 3 and 4, pertaining to obstructions and fishing operations within 500 yards of the mouth of a creek, stream or river into which salmon run, must be construed as being in a state of repose after June 6, 1924, and until the Secretary of Commerce can determine and mark the mouths of such creeks, streams and rivers, is placing an interpretation thereon of strict and literal severity. The essence, the very quintessence, of the statutes is to give immediate further protection to salmon entering the mouths of fresh water streams to spawn in the fresh waters of such streams. We contend that the mouth of a stream emptying into salt water is the point or place where the fresh waters of the stream unite with salt waters of the sea at mean low tide; when the Secretary determines and marks the mouth, the

determination and marks govern the situation. To hold otherwise would be placing a premium on form, and minimizing, if not destroying, the effect and value of substance.

We urge this rehearing because the matter presented is of the greatest importance to the fishing industry in the Territory. In fact, the seriousness of the situation is such that it cannot be overstated; and not having made ourselves sufficiently clear upon the previous hearing touching the exact point we desire to urge, we respectfully ask for a rehearing in order that our contention may be more fully and more clearly stated.

Respectfully submitted,

ARTHUR G. SHOUP,
United States Attorney,
HOWARD D. STABLER,
Asst. U. S. Attorney,

Certificate of Counsel:

We hereby certify that in our judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

ARTHUR G. SHOUP,
United States Attorney,
HOWARD D. STABLER,
Asst. U. S. Attorney.